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EA-87-02



ENVIRONMENTAL ASSESSMENT BOARD

VOLUME: 408

DATE: Monday, November 9, 1992

BEFORE:

A. KOVEN Chairman

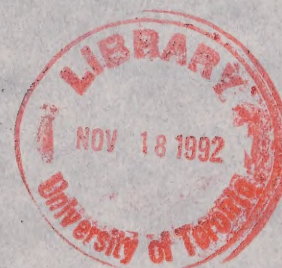
E. MARTEL Member

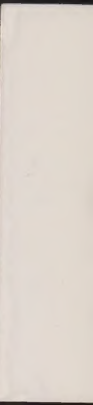
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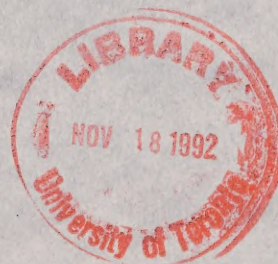
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HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL
RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR
TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental
Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental
Assessment for Timber Management on Crown
Lands in Ontario;

- and -

IN THE MATTER of a Notice by The Honourable
Jim Bradley, Minister of the Environment,
requiring the Environmental Assessment
Board to hold a hearing with respect to a
Class Environmental Assessment (No.
NR-AA-30) of an undertaking by the Ministry
of Natural Resources for the activity of
Timber Management on Crown Lands in
Ontario.

Hearing held at the Civic Square,
Council Chambers, 200 Brady Street,
Sudbury, Ontario on Monday, November
9, 1992, commencing at 9:00 a.m.

VOLUME 408

BEFORE:

MRS. ANNE KOVEN
MR. ELIE MARTEL

Chairman
Member

A P P E A R A N C E S

MR. V. FREIDIN, Q.C.	)	MINISTRY OF NATURAL
MS. C. BLASTORAH	)	RESOURCES
MS. K. MURPHY)	
MR. B. CAMPBELL)	
MS. J. SEABORN	)	MINISTRY OF ENVIRONMENT
MS. N. GILLESPIE)	
MR. R. TUER, Q.C.	)	ONTARIO FOREST INDUSTRY
MR. R. COSMAN	)	ASSOCIATION and ONTARIO
MS. E. CRONK	)	LUMBER MANUFACTURERS'
MR. P.R. CASSIDY	)	ASSOCIATION
MR. D. HUNT)	
MR. R. BERAM		ENVIRONMENTAL ASSESSMENT BOARD
MR. J.E. HANNA	)	ONTARIO FEDERATION
DR. T. QUINNEY	)	OF ANGLERS & HUNTERS
MR. D. O'LEARY		
MR. D. HUNTER	)	NISHNAWBE-ASKI NATION
MR. M. BAEDER	)	and WINDIGO TRIBAL COUNCIL
MS. M. SWENARCHUK	)	FORESTS FOR TOMORROW
MR. R. LINDGREN)	
MR. D. COLBORNE	)	GRAND COUNCIL TREATY #3
MR. G. KAKEWAY)	
MR. J. IRWIN		ONTARIO METIS & ABORIGINAL ASSOCIATION
MS. M. HALL		KIMBERLY-CLARK OF CANADA LIMITED and SPRUCE FALLS POWER & PAPER COMPANY



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APPEARANCES (Cont'd):

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MR. P. ODORIZZI		BEARDMORE-LAKE NIPIGON WATCHDOG SOCIETY

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MR. M.O. EDWARDS	FORT FRANCES CHAMBER OF COMMERCE
MR. P.D. McCUTCHEON	GEORGE NIXON
MR. C. BRUNETTA	NORTHWESTERN ONTARIO TOURISM ASSOCIATION

I N D E X O F P R O C E E D I N G S

ARGUMENT:

Page No.

Seaborn

69607

1 ---Upon commencing at 9:05 a.m.

2 MADAM CHAIR: Good morning, Ms. Seaborn.
3 The Board is ready to listen to your final argument.

4 Mr. Martel is wondering if this will take
5 more than an hour.

6 MS. SEABORN: It would be nice if we
7 could do it in an hour, Mr. Martel, but I don't think
8 that's possible.

9 ARGUMENT BY MSES. SEABORN and GILLESPIE:

10 MS. SEABORN: Madam Chair, Mr. Martel,
11 Ms. Gillespie and I are delighted to have the
12 opportunity to address you today and tomorrow and with
13 the able assistance of Mr. Sutterfiled and Ms. Dahl we
14 hope that we can answer a number of questions that you
15 have raised over the past several weeks in respect of
16 the legal issues and other issues surrounding the
17 approval of this undertaking.

18 I want to begin this morning by providing
19 the Board with two documents. First, as the Board
20 requested, we prepared an executive summary of our
21 written argument and we have copies of that for
22 everyone.

23 The second document we have, Madam Chair,
24 is a brief outline of the topics that we propose to
25 address over the next two days.

1 I want to briefly address the outline of
2 our oral argument, Madam chair. The first topic that I
3 will be addressing is the Board's jurisdiction to
4 render a decision. In that area I will be dealing
5 primarily with the requirements of Section 12 of the
6 Environmental Assessment Act.

7 In the second topic, where I will be
8 addressing the Board's jurisdiction to impose terms and
9 conditions of approval, I will be dealing with Section
10 14 of the Environmental Assessment Act.

11 The third topic we intend to address is
12 MOE's proposed conditions of approval in the context of
13 why it is that MOE's conditions are relatively few in
14 number, and in that area I will be going through some
15 of the history with respect to the evolution of the
16 terms and conditions of approval during the course of
17 the hearing.

18 The fourth topic that I will be
19 addressing is the legal issues in terms of the effect
20 of the Board's procedural rulings. I will be
21 addressing in particular MOE's position on three
22 procedural rulings that you made in late 1989 and early
23 1990.

24 Topic five, Mr. Martel and Madam Chair,
25 will be the requirements of Section 5(3) of the

1 Environmental Assessment Act and I will also address
2 the matter of the null alternative which has been a
3 topic of much debate during other people's argument and
4 I hope that we can be of assistance to the Board in
5 addressing these matters in particular.

6 Topics six, seven and eight relate
7 directly to the outstanding MOE concerns for which we
8 are seeking terms and conditions to be attached to the
9 approval.

10 In topic six I will be addressing MOE's
11 proposals in respect of intensive harvesting, sensitive
12 sites and abandonment.

13 In topic seven I will be addressing MOE's
14 proposals in respect of silvicultural groundrules and
15 mapping of site types.

16 In topic eight I will be addressing MOE's
17 conditions that revolve around reporting of
18 silvicultural effectiveness, and you will see under
19 topic eight I have identified in particular four
20 appendices that are presently part of MNR's current
21 terms and conditions and MOE condition 64(a).

22 In topic nine Ms. Gillespie will be
23 addressing MOE's position on AOC and access planning
24 and dealing with the matter of alternative areas for
25 harvest in the context of public consultation. We also

1 be dealing with briefly the matter of bump-up.

2 In topic ten I propose to address MOE's
3 view of what the role is of the Timber Management
4 Planning Manual and also address the rationale for our
5 proposal that an index to environmental assessment
6 components of a timber management plan be included in
7 every plan.

8 Topic eleven, which will be very brief,
9 will address MOE's position in respect of the approval
10 period.

11 I want to begin, Madam Chair, with the
12 first topic and that is the decision that the Ministry
13 of Environment asks you to make in respect of this
14 application and what your jurisdiction is to render
15 that decision.

16 My submissions on this matter could be
17 summarized in three points and I will give you those
18 points and then explain the rationale for MOE's
19 position in respect of each point.

20 The first point MOE would like to make is
21 that it is our position that the Class EA as amended by
22 the evidence received at the hearing be accepted by the
23 Board and that approval to proceed with the undertaking
24 of timber management on Crown lands in Ontario be
25 granted subject to terms and conditions.

1 My second point is that the terms and
2 conditions proposed by MNR as amended and augmented by
3 MOE's terms and conditions sufficiently fulfill the
4 purpose of the Environmental Assessment Act.

5 The third point is that the hearing that
6 you were required to hold was an environmental
7 assessment hearing in respect of the undertaking of
8 timber management. You were not asked to conduct an
9 inquiry, commission or hearing into timber management
10 or forest management at large, and I will come back to
11 the reason for my submission on that point a little bit
12 later.

13 I want to deal first then with the
14 decision you have to make and where you derive your
15 jurisdiction to make that decision.

16 Exhibit 12 of the hearing record is the
17 notice from the then Minister of the Environment, Mr.
18 Bradley, requiring the Board to hold a hearing in
19 respect to both the acceptance of the environmental
20 assessment and approval to proceed with the
21 undertaking.

22 The relevant section of the Environmental
23 Assessment Act is Section 12(2) which provided the
24 minister with the statutory authority to refer the
25 environmental assessment to this Board for both

1 acceptance and approval.

2 The Board will be aware that in some
3 cases the minister accepts the environmental assessment
4 and refers only the question of whether or not approval
5 to proceed with the undertaking should or should not be
6 given.

7 Section 8 of the Environmental Assessment
8 Act sets out the matters the minister must consider in
9 deciding whether or not an environmental assessment is
10 acceptable.

11 Where the matter of acceptance has been
12 referred to the Board, it is our submission that the
13 Board must also consider these same matters in Section
14 8 and the matters in Section 8 are essentially the
15 purpose of the Environmental Assessment Act must be
16 considered, the government review of the environmental
17 assessment must be considered, submissions made by the
18 public, government ministries and agencies and the
19 Proponent must be considered and the environmental
20 assessment itself must be considered.

21 In the context of this hearing, the Board
22 must also consider Section 2 of the Environmental
23 Assessment Act which sets out the purpose of the act,
24 the Board must consider the government review which is
25 Exhibit 5, the Board must consider the submissions made

1 in evidence during the hearing itself and the Board
2 must also consider the Class EA document which is
3 Exhibit 4.

4 As the Board is no doubt aware, an
5 environmental assessment can be expanded to include all
6 of the evidence adduced at the hearing. The practical
7 effect of this proposition is that the Board is not
8 restricted to examining just Exhibit 4, the Class EA
9 document itself, when you are determining whether the
10 Class EA is acceptable.

11 In MOE's submission this is a significant
12 power for the Board in that where proposed conditions
13 of approval are at variance with the approach taken in
14 the Class EA by the Proponent the Board has the
15 necessary jurisdiction to amend the Class EA to
16 accommodate those conditions.

17 Now, the position of MOE is set out at
18 page 36 our written argument. You will see, Madam
19 Chair, Mr. Martel, in the very first two paragraphs on
20 page 3 of the argument we have set out what our
21 position is in respect of the decision that you have to
22 make.

23 Now, my second submission at the outset
24 of this topic, Madam Chair and Mr. Martel, is that it
25 is MOE's view that the terms and conditions proposed by

1 MNR as amended and augmented by MOE's terms and
2 conditions sufficiently fulfill the purpose of the
3 Environmental Assessment Act.

4 Now, we make this submission in part to
5 respond to a question you posed, Mr. Martel, to Mr.
6 Lindgren during his oral presentation in respect of
7 meeting the requirements of Section 2.

8 As I recall that exchange, Mr. Martel,
9 you had said to Mr. Lindgren: How could he be urging
10 upon the Board all of these terms and conditions
11 because MOE says that MNR has met the requirements of
12 the act.

13 Now, MOE views the adoption of MNR's
14 conditions as amended by MOE proposals as being the
15 minimum requirements the Board should impose on MNR to
16 ensure the approval compiles with the act.

17 In my submission I used particular
18 terminology. I said that the conditions sufficiently
19 fulfill the requirements of the act and I want to show
20 you where I have taken those words from.

21 If you look at the Class Environmental
22 Assessment for Access Roads to the Ministry of Natural
23 Resources' facilities, which was filed as Exhibit 886
24 in the hearing, you will see on the first page in
25 Exhibit 886 and turn over to the back of the page, item

1 2, you will see in item 2 that what the Minister of the
2 Environment said in respect of this particular Class EA
3 was that the class environmental assessment together
4 with the government review and the attached conditions
5 sufficiently fulfill the purpose of the Environmental
6 Assessment Act which is the betterment of the people of
7 the whole or any part of Ontario by providing for the
8 protection, conservation and wise management in Ontario
9 of the environment.

10 So it is our submission, Madam Chair and
11 Mr. Martel, that when you are turning your mind to the
12 question of whether or not the terms and conditions
13 that you want to consider imposing as part of this
14 approval meet the requirements of the act, what you
15 need to do at a minimum is be satisfied that you would
16 have sufficiently fulfilled the requirements of the
17 act.

18 You can, Mr. Martel, do more than that
19 and that is where I think that Mr. Lindgren's
20 submissions to you about FFT's additional terms and
21 conditions can still be considered by you when you come
22 to your decision, regardless of the position that MOE
23 has taken as to the status of MNR terms and conditions.

24 In our submission the elements of Section
25 5(3) will have been adequately addressed by adoption

1 of the particular conditions we urge the Board to
2 accept and I will be returning specifically to this
3 topic, as I indicated, later on in the argument and
4 provide you with the rationale for that submission.

5 Particular matters that MOE has addressed
6 in respect of potential and actual environmental
7 effects and mitigation measures are essentially those
8 that are relevant to MOE, a mandate that MOE felt it
9 had particular expertise to address. That is not to
10 say that the Board cannot require MNR to do more than
11 we propose. Our proposals are to be viewed as minimum
12 requirements to ensure that the purpose of the act has
13 been sufficiently fulfilled.

14 In short, Madam Chair, Mr. Martel, we
15 could not address every environmental effect, potential
16 or actual in respect of this undertaking.

17 Now, the third submission I made to you
18 at the outset of this section of the argument is no
19 doubt self-evident to the Board, but nonetheless
20 important in MOE's view. The hearing that you were
21 required to hold was an Environmental Assessment Act
22 hearing in respect of the undertaking of timber
23 management.

24 Both Mr. Freidin and Ms. Cronk in their
25 submissions made the point to you that this was a

1 timber management hearing and not a forest management
2 hearing.

3 MOE does not disagree with these
4 propositions. However, it is our view that the words
5 'environmental assessment' must be added before the
6 words timber management. This is first and foremost an
7 environmental assessment hearing and, accordingly, the
8 approval and the future planning and conduct of the
9 four activities must be structured such that there is
10 compliance with the act.

11 Timber management is not a new activity,
12 but it has been carried out under the terms of an
13 exemption order since the enactment of the
14 Environmental Assessment Act in 1975.

15 Timber management will, as a result of
16 your decision, and assuming you do give approval to
17 proceed with the undertaking, for the first time be
18 carried out pursuant to the terms of the Environmental
19 Assessment Act. So necessarily at a minimum your
20 decision must reflect those minimum requirements.

21 As I indicated previously, I will be
22 coming back specifically to the topic of what MOE views
23 as being the minimum requirements to ensure that the
24 approval does, in fact, meet the requirements of
25 Section 5(3).

1 The second topic that I am going to
2 address, and this is No. 2 on the outline, is the
3 Board's actual jurisdiction to impose terms and
4 conditions of approval.

5 There are four submissions that I propose
6 make to you in respect of your jurisdiction to impose
7 terms and conditions of approval and I will read these
8 four points to you and then come back to each one
9 individually.

10 Subsection 14(1)(b) of the Environmental
11 Assessment Act is where you derive your jurisdiction to
12 get give approval to proceed with the undertaking
13 subject to terms and conditions.

14 The second submission is that your
15 jurisdiction to require conditions by your statutory
16 authority in respect of the types of conditions you can
17 order is found in subsection 14(1)(b)(i) through
18 (vii).

19 My third submission is that your
20 conditions of approval may be contrary to existing
21 government policy. However, they need not be.

22 My final point is MOE's view as to what
23 test you should apply when you are considering
24 appropriate terms and conditions of approval.

25 With regard to that test, I think it

1 would be easiest if you turn to page 162 of our written
2 argument behind Tab 4. You will see in the middle of
3 the page at page 162 we say:

4 "MOE submits that the Board should
5 apply the following two-fold test in
6 determining whether to require a term and
7 condition to prevent, mitigate or remedy
8 any potential effects on the
9 environment."

10 The first bullet point is that:

11 "The Board must first be satisfied on
12 the evidence that there is a relationship
13 between the way in which timber
14 management is carried out and the
15 environmental effect of concern to the
16 party.

17 "Having established that relationship,
18 the test of whether the term and
19 condition should be adopted is one of
20 whether the proposed term and condition
21 is a reasonable manner of addressing that
22 effect."

23 I will come back, Madam Chair and Mr.
24 Martel, to the rationale behind that test when I
25 address that point.

1 My first submission on this topic was
2 that your authority to give approval subject to terms
3 and conditions flows from Section 14(1)(b) of the act.

4 At page 11 of our written argument we set
5 out for you all your options under the Environmental
6 Assessment Act; that is, you can give approval to
7 proceed, give that approval subject to terms and
8 conditions or refuse to give approval.

9 In making your decision pursuant to
10 Section 14 you must consider the purpose of the
11 Environmental Assessment Act, the environmental
12 assessment as accepted and any submissions that have
13 been made in respect of the environmental assessment.

14 The second point that I made to you at
15 the outset was that in MOE's view your latitude to
16 impose conditions is wide.

17 If you go to Section 14 of the act and if
18 you look under Section 14(b) you will see a very long
19 list of matters that you can address when you are
20 turning your mind to the issue of what terms and
21 conditions to impose. It is our submission you should
22 keep this list in mind when you are evaluating the
23 various terms and conditions that have been proposed to
24 you by the parties.

25 Now, the Environmental Assessment Board

1 has ruled previously that the authority to impose terms
2 and conditions is limited to those terms and conditions
3 which relate directly to the undertaking or the manner
4 in which it is carried out and that was a decision,
5 Madam Chair, in the Sault Ste. Marie Regional
6 Conservation Authority Proposed Water Management Scheme
7 for Central Creek Decision and that particular
8 statement is found at page 18 of that decision.

9 It is our submission that this statement
10 should be of assistance to the panel in determining
11 appropriate conditions in respect of this undertaking.

12 Now, the third submission that I made to
13 you in respect of your jurisdiction to impose terms and
14 conditions was that your conditions of approval may be
15 at variance with existing government policy. However,
16 it need not be.

17 I would like to address the matter you
18 raised, Mr. Martel, with Mr. Freidin with respect to
19 the policy of the government in relation to chemical
20 insecticides.

21 You will recall, Mr. Martel, I believe it
22 was on the first day of Mr. Freidin's argument, that
23 you raised a particular question about that government
24 policy and, as I recall from the reviewing the
25 transcript, you raised the question in the context of

1 Mr. Freidin's submission that a minister such as the
2 Minister of Natural Resource or the Minister of the
3 Environment cannot dictate to the cabinet funding
4 levels in respect of staffing of that, was the
5 particular point that Mr. Freidin was making, and then,
6 Mr. Martel, you indicated a concern about this policy
7 on chemical insecticides.

8 As I understand your concern, you
9 indicated that if the Board's powers are the same as
10 the ministers how can you effect government policy.

11 I want to try and answer your question
12 with two submissions. The first is that when one
13 speaks of your powers as being the same as the Minister
14 of the Environment it is done so in the context of the
15 Environmental Assessment Act.

16 Now, Subsection 14(1)(b) lists the
17 matters that the minister can address when she
18 considers approving an environmental assessment.
19 Previous Board rulings have indicated where the
20 approval function is referred to the Board, then the
21 Board steps into the shoes of the minister. The
22 minister has, in effect, transferred her
23 decision-making function to you.

24 Now, suppose for a moment that this Class
25 EA was not referred to this Board, suppose for a moment

1 that the minister was reviewing and considering whether
2 or not to approve this undertaking, she could based on
3 the legislation as one of her terms and conditions of
4 approval make a decision that was contrary to existing
5 government policy.

6 She could make a decision in one of her
7 terms and conditions in respect of chemical
8 insecticides that was contrary to her own government
9 policy. She would have this unique jurisdiction that
10 no other minister in the cabinet would have as a result
11 of the provision of the Environmental Assessment Act.
12 She would not have that authorized because she is a
13 member of cabinet. She will only be able to do it
14 under the terms of the act.

15 Mr. Martel, what I want to make clear, as
16 clear as possible to you is that we are not suggesting
17 in the context of the chemical insecticide policy that
18 you have to do anything. You are not required to
19 address that particular government policy. You can if
20 you choose to based on the evidence, but you are not
21 required, but I wanted to make it clear why it was the
22 minister could effect her own policy. I hope that's
23 helpful to you.

24 MR. MARTEL: If I could just follow that
25 up because I want to make sure I don't lose it.

1 If the minister on the chemical policy
2 issue decides that contrary to the government policy
3 she would want to use it under the act and the crunch
4 comes down with the cabinet, that we don't care, it is
5 government policy, you are not using it -- in fact,
6 that is what was happened since '85. You are not using
7 it.

8 MNR has continued to plan for it. We
9 have heard that evidence here, they continue to plan
10 for the possible use of insecticide, and Mr. Churcher's
11 evidence was to that effect and the government and
12 subsequent governments continue to say no.

13 The effect of the minister's decision and
14 the act go out the window when the government, three
15 governments have said exactly the same thing: You will
16 not use it. So that the minister's policy or powers
17 under the act aren't as powerful as one might think in
18 terms of saying to the government you are changing this
19 when their intent is that they are not changing it.

20 MS. SEABORN: I think, Mr. Martel, that
21 if there was a legal requirement in the context of the
22 term and condition under Section 14(1)(b) of the act
23 and the minister said to the Minister of the
24 Environment to put out a specific term and condition
25 that was contrary to government policy and cabinet then

1 said to her: We don't want you to do that, we don't
2 like the fact that you did that, cabinet would then
3 probably have to make an amendment to legislation in
4 order to overrule what had happened under the
5 Environmental Assessment Act.

6 They will have to bring up cabinet's
7 concerns about this to a legislative authority because
8 your decision is going to have a legal effect and if
9 cabinet wants to interfere with matters that are
10 prescribed by what are, in effect, their own statutes,
11 then they will have to, in my submission, amend the act
12 or amend the approval somehow. They wouldn't be able
13 to do that just by policy. They would have to do that
14 by a statute.

15 Now, Mr. Martel and Madam Chair, in
16 respect of our submission that you do have this
17 jurisdiction to impose conditions that are contrary to
18 government policy, you will recall that submissions
19 were made in respect of this matter on November 14th,
20 1989 and at that time MOE filed a factum with you.
21 The legal basis for our position can be found in that
22 factum and in Volume 158 of the transcript.

23 In responding to the Board's questions
24 that are found behind Tab 4 of our written argument we
25 have provided for you a brief summary of the law in

1 respect of this matter and those submissions are at
2 page 164 to 166 of our argument.

3 Now, based on your review of the
4 submissions made to you in 1989 by all the parties it
5 is our conclusion that as a legal matter none of the
6 parties disagreed with you at that time that you can't
7 impose conditions contrary to government policy.

8 You didn't render a decision in respect
9 of this matter, but it is our evaluation of those
10 submissions that there really wasn't any dispute among
11 the parties in respect of your jurisdiction.

12 My fourth subject in this topic was MOE's
13 view as to what test you should apply when you are
14 considering appropriate terms and conditions. As I
15 pointed out, that test is found at page 126 of our
16 argument.

17 Traditionally terms and conditions of an
18 approval do relate primarily to prevention or
19 mitigation measures which is why we posed the test for
20 appropriate terms and conditions in that way.

21 In this particular instance the terms and
22 conditions as proposed by MNR go beyond mitigation
23 measures in the sense that there are areas in their
24 terms and conditions that essentially repeat topics
25 that are addressed in the Class EA document itself.

1 If you look at other Class EAs, what has
2 traditionally happened is that you have a Class EA with
3 attached maybe four or five pages of terms and
4 conditions and Class EAs, plus these terms and
5 conditions tend to make up the whole document that goes
6 to the public after the approval is in place.

7 In this particular instance, what MNR has
8 done is they have include in their terms and conditions
9 most of the areas that were originally addressed in the
10 blue book, Exhibit 4. So we have a much thicker
11 document in terms of the potential condition of
12 approval in this particular case. It is not the
13 unusual practice.

14 So I make the submission to you that when
15 considering terms and conditions what you are really
16 looking at are the mitigation measures and that's the
17 purpose behind terms and conditions of approval.

18 The other thing that traditionally has
19 happened in the past with other Class EAs is that once
20 the minister approves the undertaking and gives a list
21 of terms and conditions of approval the proponent takes
22 away that Class EA and rewrites the Class EA to conform
23 with the terms and conditions of approval. So that you
24 have one whole amended document.

25 So if someone comes into the

1 environmental assessment office and says to Ms. Dahl:
2 I would like to know what is happening on access roads
3 to MNR facilities, how are they planned for, how is
4 that undertaking carried out, Ms. Dahl would hand them
5 Exhibit 886, which is the Class EA, and the terms and
6 conditions that go with that Class EA and say: This is
7 how it is done.

8 I will be coming back to that matter a
9 little bit later when I deal with the timber management
10 planning manual and how it impacts on your particular
11 decision that you have to make.

12 The last point I want to make in respect
13 of the submission in respect of MNR's terms and
14 conditions being relatively thick, if you go back to
15 Exhibit 900 of the record, that's a copy of MNR's first
16 set of terms and conditions which has been highlighted
17 for all parties, and in that highlighted version you
18 will recall that what MNR highlighted were all of those
19 conditions that were already referred to in Exhibit 4
20 in the Class EA document.

21 So that's why we have come to the
22 conclusion that there are a number of matters in the
23 terms and conditions that have been already been
24 addressed in the Class EA document that make that
25 distinction and the relevance of that submission I hope

1 will become apparent when I discuss the matter of the
2 timber management planning manual.

3 The third topic that I said I would
4 address to you this morning is MOE's proposed
5 conditions of approval and where it is we are today.

6 As I have indicated previously, MOE takes
7 the position that MNR's terms and conditions dated
8 January 6, 1992 as amended and augmented by MOE
9 proposals sufficiently fullfil the purpose of the
10 Environmental Assessment Act.

11 The conditions have evolved during the
12 course of the hearing and if you compare MNR's 1989
13 conditions with those submitted in 1992, and most
14 recently as amended by Part 5 of MNR's written
15 argument, it is clear to MOE that substantial progress
16 has been made.

17 There are a variety of proposals that
18 originally came from the intervenors that appear in
19 MNR's final terms and conditions.

20 MNR's terms and conditions reflect
21 agreements reached during the Board-ordered
22 negotiations. These agreements were provided to you in
23 the Illing Report which is Exhibit 2031.

24 It is our submission that while you are
25 not bound in law to adopt the Illing Report, where

1 major parties to a hearing who represent diverse
2 interests have reached unanimous agreement on the
3 wording and rationale for a particular condition, the
4 Board ought not to reject these agreements so long as
5 you are satisfied that the proposals are reasonable
6 based on your assessment of the evidence.

7 I believe Mr. Cassidy made a similar
8 submission to you in that regard and we support the
9 Industry's position in respect of the adoption of the
10 Illing Report.

11 Now, as I indicated, MNR's terms and
12 conditions have evolved since the draft was filed in
13 June of 1989, which was Exhibit 700, and MOE filed its
14 first set of terms and conditions in 1990. Those
15 conditions were marked, along with other intervenors
16 first set of conditions, as Exhibit 1278.

17 The Board will recall in those conditions
18 a number of matters were addressed and proposed as
19 conditions that do not appear in our final conditions,
20 and I will come back to the reason for that in a
21 moment.

22 In August 1990 MNR filed a further set of
23 conditions and those conditions were marked as Exhibit
24 1278A. Shortly thereafter, and in September 1990, MOE
25 submitted to the Board a revised set of terms and

1 conditions which were marked as Exhibit 1653.

2 Now, in that version, Exhibit 1653, MOE
3 largely followed the MNR format for terms and
4 conditions except that we moved the detail associated
5 with the submission into a series of appendices and in
6 those conditions the bold type represent changes MOE
7 has proposed to MNR conditions.

8 Throughout the fall of 1990 the Board
9 will recall that the other major parties to the hearing
10 also revised their conditions to respond to MNR's
11 August 1990 version.

12 The Board-ordered negotiations which was
13 chaired by Mr. Illing resulted in yet a further
14 revision of the conditions of approval and the Illing
15 Report was filed with the Board on December 12, 1991
16 and mark as Exhibit 2031 and MNR's conditions would be
17 filed in January of 1992, Exhibit 2032.

18 In February 1992 MOE filed its revised
19 conditions and in that set of conditions we only
20 identified those conditions as outstanding MOE concerns
21 and suggested amended wording in respect of those areas
22 to that proposed by MNR.

23 Now, in our final argument, the red book,
24 we have included MOE conditions for which the minister
25 is seeking approval.

1 Now, since filing this document with you
2 in September we received MNR final argument and in Part
3 5 of MNR's final argument the Board will recall there
4 was a series of charts where they made changes to some
5 of their January 6th, 1992 terms and conditions and as
6 a result of those changes we thought it might be
7 helpful to the Board if we yet one more time provided
8 you with another final version of our terms and
9 conditions.

10 MR. MARTEL: Is this the final final?

11 MS. SEABORN: This is it. I can assure
12 you, Mr. Martel.

13 We have done two things in this document
14 which I hope will be helpful to the Board. On the
15 left-hand side of the page where MNR in its final
16 argument made a change to their terms and conditions we
17 put that change in italics.

18 So in the document Ms. Gillespie just
19 handed out, if you could go to page 6, you will see on
20 page 6 term and condition 44, the third line down, MNR
21 has included in the wording in italics "including water
22 crossing removal."

23 We saw that for the first time when we
24 got their final argument. The Board will be happy to
25 see that that resulted over on page 7 in a deletion

1 from MOE, No. 44. In that deletion, the words in 44
2 deleted we have highlighted for you.

3 Now, throughout this version of the terms
4 and conditions you will see some highlighting. For the
5 Board and for all parties, what we have done is we have
6 highlighted those portions of our terms and conditions
7 that have changed in the context of the wording since
8 we presented our evidence and since our February 1992
9 draft.

10 So you will recall when the MOE witnesses
11 testified we were working from a different draft than
12 the draft you have in front of you now. As a result of
13 that evidence we went away, we made some changes and we
14 presented those changes to you in Part 5 of our final
15 argument.

16 What we didn't do for you in Part 5 was
17 highlight or indicate to you where we made those
18 changes. So we thought it would be helpful. By
19 highlighting the Board could see specifically some of
20 the new wording that we have adopted.

21 As I said, Mr. Martel and Madam Chair,
22 when we start dealing with the substantive issues we
23 will come back to the rationale for some of those
24 wording changes. There is no difference in the wording
25 in here from what we filed with our final argument,

1 just so you are clear. All we have done is highlighted
2 them.

3 MADAM CHAIR: Ms. Seaborn, are you going
4 to take the Board through each of the highlighted
5 portions of these terms and conditions?

6 MS. SEABORN: What I want to do now is
7 just indicate the two conditions that we have deleted.
8 As I said, on page 7, when we saw MNR's final argument
9 we saw that for condition 44 they had included in
10 respect of tertiary roads the words "including water
11 crossing removal" and on that basis we deleted our term
12 and condition 44 that we filed with you in the red
13 book.

14 The second change is in respect of
15 bump-up. If you go to page 21 of the new conditions
16 you will see in respect of Appendix 15 we have another
17 deletion. When we saw MNR's written argument we saw
18 that they had included some new wording with respect to
19 bump-up and so we have deleted our proposal.

20 Madam Chair, in terms of the other
21 highlighted wording where we have made changes, rather
22 than going through each one individually, we are going
23 to address those in the context of our argument on the
24 substantive issues.

25 So when I deal with the matter of

1 nutrient depletion I will explain to you the rationale
2 behind MOE condition 21(c) (i) and (ii) which we have
3 totally reworded since our evidence and I would prefer
4 to address that matter at that time, if that's of
5 assistance.

6 I want to return now to the issue, Madam
7 Chair, of why MOE's final conditions of approval
8 constitutes a relatively slim package as compared to
9 our original proposals.

10 The simple answer is that a number of
11 MOE's original proposals have been adopted by MNR.
12 Consequently, MOE relies heavily on a number of MNR
13 conditions and, in particular, upon the following, and
14 I am going to list a number of items that you if you
15 went back and looked at the first two sets of our terms
16 and conditions you would see these items appearing in
17 those terms and conditions. They have been adopted in
18 intent by MNR. In some cases our wording has been
19 followed, in other cases we negotiated with MNR
20 particular wording and we are satisfied the intent
21 behind our concern has been addressed.

22 The first matter is the sequence and
23 purpose behind the four-stage public consultation
24 process set out in MNR's condition 6 to 11.

25 The second matter is the inclusion of a

1 requirement to address non-timber values, strategies,
2 problems and issues in each timber management plan, and
3 that's now covered in MNR condition 19.

4 MNR has made a number of enhancements to
5 the Report of Past Forest Operations. In particular,
6 items 1(d) through (l) of Appendix 8 of MNR's
7 conditions were matters that MOE raised as issues of
8 concern in its first set of conditions. There are
9 still other changes that we are seeking in respect of
10 the Report of Past Forest Operations, and I will come
11 to that matter when I deal with reporting on
12 silvicultural effectiveness.

13 MNR has included in its conditions a
14 requirement that planners depict the MAD calculation in
15 a graph format. This was something that MOE and some
16 other parties had originally proposed to MNR.

17 MOE relies heavily on the general
18 standard site type initiative which is covered in MNR
19 condition No. 20.

20 MOE relies heavily on the requirement to
21 report exceptions from the silvicultural guides which
22 are set out in MNR 21(b) and we particularly rely on
23 the monitoring of those exceptions.

24 MOE relies on the condition that requires
25 the mapping of site types contained in the

1 silvicultural ground rules, and that was a matter that
2 was addressed by Mr. Bax in his evidence and, in fact,
3 a term and condition was negotiated with MNR in advance
4 of MOE's evidence on this matter.

5 MADAM CHAIR: Ms. Seaborn, which term and
6 condition was that?

7 MS. SEABORN: I believe it is 21 -- I'm
8 sorry, 32(a).

9 MOE relies on the streamlining of the
10 area of concern process and reliance on the various
11 manuals and exception reporting and monitoring in
12 respect of those exceptions.

13 MOE is supportive of the improvements
14 made in respect of the monitoring provisions in the
15 area of concern process, in particular the new
16 requirement to record undesirable conditions.

17 MOE relies upon the requirement to
18 address the removal of water crossings on abandoned
19 roads. We have a condition, it is still a concern, in
20 respect of how that requirement should be carried out
21 over the term of the approval and we will be addressing
22 that later.

23 MOE relies heavily on MNR's commitment to
24 list the sources of information which are summarized on
25 the values map and to identify methodologies used for

1 data collection, and that is found in MNR Appendix 9,
2 condition 1(c).

3 What we are left with, Mr. Martel and
4 Madam Chair, is a discreet number of conditions that
5 MOE urges the Board to adopt. The outstanding issues
6 may be small in number, but they are significant
7 matters that impact directly on the mandate of MOE and,
8 for the most part, were the same matters MOE witnesses
9 gave you evidence in respect of during our case in
10 April of this year.

11 If MOE did not believe that we wouldn't
12 be here before you today. It is our submission that
13 MOE's outstanding conditions coupled with MNR's
14 proposals are reasonable for the Board to adopt, that
15 they are practical in their application and that they
16 are a necessary part of this approval to ensure that
17 the requirements of Section 5(3) are satisfied.

18 In addition, our proposals are structured
19 in such a way that they could be incorporated into
20 whatever planning process the Board adopts as part of
21 its conditions of approval.

22 For example, our conditions in respect of
23 reporting on silvicultural effectiveness and
24 identifying alternate areas for harvest are, in our
25 submission, legitimate proposals.

1 The fact that we have fitted our
2 proposals into MNR conditions is a function of MOE
3 trying to provide the Board with a manageable way to
4 review our proposals and contrast them with MNR and
5 other parties' conditions.

6 As I indicated out at the outset, MOE and
7 the major parties cooperated in putting together the
8 terms and conditions in the sense that the major
9 parties agreed that it would be most helpful to the
10 Board if we all responded to the format used by MNR.

11 It seemed to us to be a sensible way to
12 make the volume and number of terms and conditions a
13 bit more manageable for the Board, rather than each of
14 us going out on our own and setting up a separate
15 structure.

16 Madam Chair, the fourth topic that I want
17 to address are the effects of the Board's procedural
18 rulings. I have three general submissions in respect
19 of this topic and I will give you those submissions and
20 then come back to each one.

21 Now, my first submission is that the
22 Board should look to the rulings it has made during the
23 course of the hearing in formulating its reasons for
24 decision. To do otherwise would be prejudicial to the
25 parties who relied on your rulings in structuring their

1 evidence and the cases they presented to you.

2 My second submission in respect of topic
3 four is that your rulings are not binding on other
4 Environmental Assessment Board panels. However, they
5 are persuasive, and I will come back to that and
6 explain to you that proposition.

7 My third submission is that, similarly,
8 the decision you make in respect of this application
9 will not be binding on future proponents or future
10 Environmental Assessment Board hearing panels but,
11 again, it will be persuasive. I will come back to the
12 terminology of decisions being persuasive and binding
13 in the legal sense when I address that submission.

14 I want to deal with the first topic which
15 in MOE's view is particularly important and that was
16 that the Board should rely on its rulings and to do
17 otherwise would be, in our submission, prejudicial to
18 the parties.

19 I want to do this first by putting into
20 context and identifying for you particular rulings we
21 are referring to.

22 Now, you will recall that on June 1st,
23 1989, you issued a ruling in respect of whether the
24 Proponent could be compelled to call evidence in
25 respect of the potential human health effects of pest

1 control products and formulations the Proponent wishes
2 to use within the area of the undertaking.

3 In considering this matter, you turned
4 your mind to the issue of what your jurisdiction was in
5 respect of terms and conditions of approval as it
6 relates to pesticides. That ruling was not appealed by
7 any party to the hearing.

8 In January 1990, on January 17, you
9 released your ruling in respect of licensing and the
10 definition of the undertaking. In that ruling you
11 concluded that the undertaking before you should
12 properly be defined or characterized as a timber
13 management proposal, plan or program in respect of the
14 activities of access, harvest, renewal and maintenance.
15 You explicitly made a finding to that effect at page 6
16 of your ruling. You also dealt with the matter of
17 allocation in that ruling.

18 The two decisions that you came to in
19 that ruling were not appealed by any party to this
20 hearing.

21 Now, on February 23rd, 1990, you
22 determined that the purpose of the undertaking should
23 not be amended to accommodate the objectives of an
24 intervenor's case. In your ruling you confirmed that
25 the Proponent has always taken the position that the

1 purpose of the undertaking is to provide a continuous
2 and predictable supply of wood for Ontario's Forest
3 Products Industry and you indicated that you had
4 clearly understood this purpose to be the actual
5 purpose of the Proponent's undertaking. This ruling
6 was not appealed by any party to the hearing.

7 Now, in respect of these rulings, the
8 Board receive extensive submissions from the parties.
9 You received statements of fact and law, you received
10 briefs of authorities and you considered parties'
11 submissions and came to a decision in each case.

12 It is our submission that to change your
13 decision now would be wrong. I would submit it would
14 be wrong in law and it would be prejudicial to the
15 parties in this hearing.

16 Ms. Cronk in her submissions referred in
17 particular to the ruling you made in respect of the
18 purpose of the undertaking. Had you decided to change
19 the purpose of the undertaking or came to a different
20 conclusion in your ruling, I expect the OFIA's evidence
21 might have been very different. They may have called a
22 very different case.

23 The same reasoning should be applied to
24 all of your rulings. When a Board issues a formal
25 ruling with reasons for which there is no appeal, it is

1 our submission that parties are entitled to proceed on
2 the basis of those rulings.

3 In our submission you can and should rely
4 on your previous rulings when you are writing your
5 decision. MOE has relied upon them extensively in
6 answering the questions you posed in July 1992 and you
7 will see in our answers, which are behind Tab 4 of our
8 written argument, we looked first to the rulings that
9 you had already made in formulating our response.

10 You will recall that there was a
11 particular question that you posed about your
12 jurisdiction in respect of pesticides in one of your
13 Board questions. We went back and we looked at your
14 ruling on human health effects and we saw that you in
15 some detail turned your mind to the question of your
16 jurisdiction to deal with pesticides.

17 It is our submission to you that when you
18 are writing this decision, where a ruling is relevant
19 to a matter that you have to decide, you should go back
20 and look at those rulings and you should be able to
21 rely on those rulings when you write your decision.

22 I want to deal specifically with the
23 January 1990 ruling in respect of the definition of the
24 undertaking. Mr. Freidin identified as the very first
25 issue in his written argument, it is a question: Is

1 timber management planning part of the undertaking of
2 timber management. This is at page 5 of their written
3 argument.

4 MOE's response to that question is yes
5 and why do we say yes, because you explicitly dealt
6 with the matter over two years ago.

7 MOE submits that your ruling was clear
8 and concurs with the result. If my client felt
9 otherwise they perhaps may have given me instructions
10 to have appealed your decision. We do not think the
11 matter should be reargued in your decision.

12 The flip side of that is that had you
13 come to a different conclusion my client may have asked
14 me to appeal that decision in order to try and urge
15 someone else that you were wrong. It goes both ways.

16 Now, while I understand that Mr. Freidin
17 is no longer requesting that you change your ruling, he
18 is seeking some clarification from you in the event
19 that your ruling is relied upon in the formulation of
20 individual environmental assessments arising from
21 bump-up requests in respect of this Class EA. He wants
22 it clarified because he is concerned about the
23 formulation of individual EAs.

24 MR. MARTEL: Run that one by me again.

25 MS. SEABORN: Yes. What Mr. Freidin's

1 submission was to you, as I recall, was he wanted you
2 to clarify your ruling because he has a concern that
3 after the approval is in place, and assuming for a
4 moment a bump-up request is made and the minister
5 grants the bump-up request and requires MNR for a
6 particular FMU or a portion of an FMU to go out and
7 prepare an individual environmental assessment, he is
8 somehow concerned that your ruling will impact upon how
9 that individual environmental assessment is put
10 together.

11 I believe that was the concern that he
12 addressed in his written submissions to you and in his
13 oral argument.

14 MR. FREIDIN: Mr. Martel, that was one of
15 the three propositions that I put to you. It was the
16 third concern that I had about how the Board ruling
17 might be interpreted. There were two other ones which
18 may or may not be addressed by Ms. Seaborn.

19 MS. SEABORN: The other concern that I
20 had noticed that Mr. Freidin made in respect of your
21 ruling was that it may be relied upon for future class
22 environmental assessments or it may be relied upon by
23 future proponents.

24 Now, Mr. Freidin's concerns really leads
25 me to my second submission which was that your rulings

1 are not binding on other Environmental Assessment Board
2 panels. However, they are persuasive.

3 In law, Environmental Assessment Board
4 panels are of equal status. There is no hierarchy
5 between this particular panel and a panel of your
6 colleagues. For example, at the moment there is a
7 hearing going on in respect of OWMC's application,
8 there is a hearing in progress with respect to Ontario
9 Hydro's DSP application. There are a number of other
10 hearings that members of the Environmental Assessment
11 Board are conducting.

12 You are considered in law panels of equal
13 status. What this means is that your rulings can be
14 referred to by your colleagues who are conducting other
15 Environmental Assessment Board hearings. Lawyers will,
16 as a matter of course, find out what has happened in
17 other hearings, what procedures have been followed and
18 whether there exist any rulings from other panels that
19 may be of assistance to them.

20 What I think is important for the Board
21 to recognize is that it is always open to a Board to
22 distinguish or disagree with the rulings and decisions
23 made by colleagues in another hearing.

24 The other point is that I understand that
25 your rulings have, in fact, been referred to by counsel

1 at other ongoing Environmental Assessment Board
2 hearings.

3 Your rulings that have been made to date,
4 the three that I have mentioned, have been quote now in
5 environmental law textbooks as rulings of the
6 Environmental Assessment Board.

7 They are out there, they are in the
8 literature, people are going to look at those rulings
9 and if they have an advantage, if there is an advantage
10 in those rulings, then they are going to rely upon
11 them.

12 MR. MARTEL: I thought that was the key
13 word.

14 MS. SEABORN: Frankly, there isn't much
15 that you can do about that.

16 Now, your ruling in respect of the
17 definition of the undertaking may in fact be relied
18 upon by future Environmental Assessment Board panels in
19 considering a class environmental assessment. That
20 future panel may agree with your reasoning or they may
21 decide to distinguish the decision that you already
22 made on the basis of the set of facts that are already
23 in front of them.

24 In our submission it would be
25 counter-productive for you to spend time worrying about

1 how a ruling that you have already made may or may not
2 affect future proponents or future Class EAs.

3 As I said, in the legal context they are
4 binding on no one. They are persuasive. Lawyers will
5 always find a way to use those rulings and the Board's
6 decision to their advantage.

7 If a party does not find one of your
8 rulings to their advantage, the first thing they will
9 do in front of that other Board is distinguish the
10 ruling in respect of the definition of the undertaking
11 for timber management on the set of facts that are
12 before this Board.

13 Now, I do want to address this matter and
14 I see, Madam Chair, it is 10:20. Would this be an
15 appropriate time to take a break?

16 MADAM CHAIR: It is convenient for us,
17 Ms. Seaborn.

18 MS. SEABORN: Thank you.

19 MADAM CHAIR: We will be back in 20
20 minutes.

21 ---On recessing at 10:20 a.m.

22 ---On resuming at 10:45 a.m.

23 MS. SEABORN: Thank you, Madam Chair, Mr.
24 Martel.

25 As I indicated before the break, as I

1 understand Mr. Freidin's position, he is no longer
2 requesting that you change your ruling in respect of
3 the definition of the undertaking, but he is seeking
4 some clarification.

5 One of the reasons that Mr. Freidin said
6 he required clarification was that he was concerned
7 about how your ruling of the definition of the
8 undertaking in respect of this Class EA may affect the
9 preparation of individual environmental assessments in
10 respect of timber management plans and the situation is
11 this.

12 Suppose after this approval is in place a
13 bump-up request is made to the minister with respect to
14 one of the activities or something to do with the
15 timber management plan, the minister considers the
16 request, grants the bump-up and says to MNR: Please go
17 ahead and prepare an individual environmental
18 assessment.

19 Now, for some reason, I take it Mr.
20 Freidin is concerned that when that individual
21 environmental assessment is being prepared by MNR that
22 somehow your ruling from this hearing will impact upon
23 how that individual environmental assessment is
24 formulated by the proponent.

25 It is our position that this simply isn't

1 the case. In granting a bump-up request and requiring
2 a proponent to prepare an individual assessment, the
3 proponent is basically going back to square one. The
4 proponent has to prepare individual environmental
5 assessment in accordance with the provisions of the
6 Environmental Assessment Act.

7 MNR would have to provide a description
8 of the purpose of that individual Environmental
9 Assessment Act. It may or may not be the same purpose
10 as the purpose of the Class EA. It depends on what the
11 problem is that the proponent wants to address.

12 Similarly, the definition of the
13 undertaking would depend entirely upon what it is the
14 problem was that led to the granting of the bump-up
15 request in the first instance.

16 What MNR would have to do, because they
17 were faced with a bump-up request that had been granted
18 in preparing an individual environmental assessment, is
19 they would have to determine what the problem was that
20 they wanted to address. They would have to go through
21 all of Section 5(3).

22 That environmental assessment would then
23 go through the normal government review steps under the
24 act and the minister would make a decision about
25 whether or not to then refer that to the Board for a

1 hearing.

2 Based on the facts before it, that
3 particular board, if a hearing were held, would
4 determine whether or not MNR had provided an
5 appropriate description of the purpose of the
6 undertaking, whether it had provided a rationale for
7 the undertaking, whether it had provided a description
8 or definition of the undertaking itself and whether it
9 considered the appropriate alternatives.

10 We don't see the same connection between
11 the decision that you have made in respect of this
12 class environmental assessment with future individual
13 environmental assessments.

14 The minister could, for example, be faced
15 with a bump-up request that relates to a very narrow
16 issue like the location of a road within a specific
17 geographic area of a management unit, and suppose the
18 minister considered the submissions from the person who
19 made the request and said: The Class EA planning
20 process couldn't accommodate the concerns in respect of
21 that road, MNR and these parties went through the whole
22 Class EA planning process and there was still a concern
23 and I am convinced that this a legitimate concern so I
24 am going to make MNR go away and do an individual
25 environmental assessment just with respect to that road

1 and, in effect, the minister will be saying I am going
2 to grant the bump-up request in respect of that road on
3 that geographic area.

4 MNR then as the Proponent, as the
5 proponent always has, would have the responsibility to
6 set out what is the purpose of this individual
7 environmental assessment. The purpose would be tied
8 presumably, I don't know, but presumably MNR would
9 structure the purpose of its undertaking consistent
10 with the problem that it wanted to address; i.e., how
11 can we deal with the environmental impacts of this
12 road.

13 They would define the particular
14 undertaking which may be just the activity of access
15 and how access should be planned for that particular
16 problem. They would go through and look at
17 alternatives. They would not import, in our
18 submission, the purpose of this particular undertaking
19 and, more importantly, the definition of the Class EA
20 that you have prescribed in your ruling.

21 So in our submission we do not think that
22 your ruling requires clarification as a result of what
23 may happen in the future.

24 Now, in the first day of argument at page
25 68,087 of the transcript and it is Volume 397 --

1 MADAM CHAIR: What number was that again?

2 MS. SEABORN: Page 68,087, Volume 397.

3 Mr. Freidin made the submission to you, and I will just
4 read it briefly:

5 "So I just foresee in the future the
6 possibility that there will be an
7 individual environmental assessment as a
8 result of a bump-up request and somebody
9 is going to come along and say: Well,
10 because the Board in the class
11 environmental assessment said timber
12 management includes a planning process,
13 that in that individual EA you have got
14 to start developing or considering a
15 different planning process. That would
16 be improper.

17 "I don't believe that the concern is
18 theoretical, very theoretical or it is
19 unlikely. I think it is a likely
20 scenario and I understand that the
21 Ministry of the Environment agrees with
22 this submission."

23 I think Mr. Freidin perhaps corrected the
24 record later on, but I just wanted to make it clear
25 that we absolutely disagree with this submission.

1 So it is our position that the steps
2 required to be taken by a proponent in the event that a
3 bump-up request is granted and the obligations on a
4 proponent to describe its purpose and the undertaking
5 are governed by the provisions of the Environmental
6 Assessment Act.

7 They are neither constrained nor governed
8 by your ruling in respect of the definition of the
9 Class EA that is before you.

10 Just to reiterate. If an individual
11 environmental assessment is prepared some time in the
12 future in respect of timber management because there
13 was a bump-up request, then you would not have to go
14 back to the Class EA in terms of setting out your
15 purpose and your definition of the undertaking.

16 The proponent goes back to square one to
17 deal with the problem that resulted in the bump-up
18 request being granted in the first instance.

19 The proponent has the absolute discretion
20 to deal with the problem in a number of ways. MNR may
21 choose to deal with the problem by defining its
22 undertake very narrowly, they may choose to deal with
23 the problem by defining this new undertaking very
24 broadly. They do not have to go back and do something
25 that is in accordance with your ruling on the

1 definition of the undertaking.

2 MADAM CHAIR: Ms. Seaborn, we have heard
3 another point of view, that an approval will have
4 streamlined some requirements or provided some minimum
5 information that would practically be seen as necessary
6 in an individual EA or would have already been covered
7 in an approval.

8 So you are not saying that any future
9 individual EAs would have no regard at all to the class
10 EA or not in some way look to see if that problem had
11 been addressed at this hearing?

12 MS. SEABORN: Once your approval is in
13 place and MNR has prepared timber management plans in
14 accordance with the approval and someone comes along
15 and says: I don't think the planning process approved
16 by the Board or included by the Board in the terms and
17 conditions of approval addresses my concern, this was
18 something that was not anticipated when the Class EA
19 was put into place, so the person goes to the Ministry
20 of the Environment and says: I am asking for an
21 individual EA with respect to that problem.

22 It is true that there will be
23 streamlining. However, unlike, I believe, the
24 submissions of OFAH, it is not a question of any
25 individual EA going back and reapplying the Class EA.

1 They would have already applied the Class EA.

2 What the person who is asking for the
3 bump-up request is saying is I went through everything
4 that Mrs. Koven and Mr. Martel said that should be gone
5 through. The person participated, they went through
6 all the terms and conditions, they went through the
7 planning process, I am still not satisfied.

8 Then they go to the Ministry of the
9 Environment and say: We want detailed planning or we
10 want this specific problem addressed.

11 So we do not agree that you would then
12 just go back and apply the Class EA. You have already
13 applied the Class EA process and for this unanticipated
14 concern you haven't gotten the intended result.

15 MADAM CHAIR: Could you also anticipate a
16 situation where the Minister of the Environment may,
17 faced with a bump-up request, say: Well, I think this
18 was discussed and settled in some way in an approval
19 and we are relying on this, I won't grant you a bump-up
20 request?

21 MS. SEABORN: Yes, that is definitely a
22 possibility and, I would submit, it is probably going
23 to happen when people make bump-up requests.

24 That's a different question than what I
25 am addressing now because in that case what the

1 minister says to the person is: I'm sorry, we had this
2 long hearing, Madam Chair and Mr. Martel addressed the
3 issue of planning for roads in their decision, MNR
4 followed that process and we think that because Mr.
5 Martel and Mrs. Koven looked at that issue I am not
6 going to grant you your bump-up request and the bump-up
7 request would be denied.

8 So, no question, what you decided here
9 today will be taken into account and your approval will
10 be taken into account.

11 What I am talking about is the situation
12 where the minister has granted the bump-up request
13 because in granting the bump-up request, what the
14 minister is saying to that individual is: I agree with
15 you that the Class EA was not capable of addressing
16 your concern and I am satisfied that MNR should go back
17 and for that particular matter address it in a
18 different way or in more detail. It may be in respect
19 of a small geographical area, it may be in respect of a
20 road, it may be in respect of one of the activities.

21 So when I address Mr. Freidin's
22 submission, I am addressing it from the point of view
23 that the minister has already determined that a bump-up
24 is appropriate.

25 I agree, Madam Chair, and it would be our

1 submission in a few minutes that what you will be doing
2 is streamlining the EA process, but that is a different
3 matter from this particular issue.

4 MR. MARTEL: When you look at these
5 individual activities and one of them might not have
6 been considered or covered by the act, what you are
7 saying is that you define it, the purpose, for that
8 particular matter.

9 The question I ask is: If you go back to
10 square one and deal with everything because that seems
11 to be -- and I don't want to misread anyone's position
12 here, but I think some of the parties are asking that
13 on each individual item or activity you go right back
14 to the unit level as opposed to a broad interpretation.

15 I don't know if I am misinterpreting
16 anyone, but my understanding is that people want to go
17 back to the individual activities at the project level
18 as opposed to an all-encompassing level that I think
19 MNR is seeking approval for.

20 Am I at a different wave length than you
21 are?

22 MS. SEABORN: I think I can address that,
23 Mr. Martel, in two ways.

24 I am going to come to the matter of why
25 it is MOE believes that as a result of this approval it

1 will not be necessary when conducting timber management
2 planning for the planning team to go back to, as you
3 put it, square one and consider all of the matters that
4 you and Mrs. Koven have considered.

5 I am going to come to that issue in a
6 moment specifically. That is an important issue and I
7 will address specifically, I hope to your satisfaction,
8 how we see that matter being resolved.

9 Again, what we are referring to is a
10 situation where the minister has required MNR to
11 prepare an individual assessment in respect of a
12 particular problem. That is very different from
13 planning for timber management plans on a five-year
14 basis for a hundred management units. That's not what
15 we are talking about. We are talking about the very
16 narrow situation where a bump-up request is granted.

17 MR. MARTEL: But even that request would
18 still come under some activity that occurred.

19 I mean, my concern is we are trying to
20 split hairs here. No matter what you look at it, it is
21 somewhere covered. The individual activity that you
22 speak about, and it might not have been identified to
23 this point in time, but it is still going to fall
24 within the framework of the planning process.

25 Even though we hadn't dreamt it up yet,

1 it is still going to be involved on some units,
2 somewhere out there, involving some activity that's
3 encompassed by timber management planning and no matter
4 how we couch it it still comes back to what do you do
5 each time.

6 I am not sure if we are not trying to be
7 too -- I don't want to say too cute, but the issues
8 will be there and they are going to occur on some unit,
9 on some site and no matter how you cut it the question
10 is: Where do you start. At least for me. Maybe the
11 rest of you see it somewhat differently, but quite
12 frankly I can't see it any differently.

13 MS. SEABORN: Once an activity has been
14 bumped up and an individual environmental assessment is
15 required, the planning process for the Class EA has
16 already been exhausted. That's why we are in the
17 situation.

18 Now, in terms of the level of detail that
19 MNR would have to go to when they then prepared the
20 individual EA, it is our submission that that is open
21 for grabs and that will be specifically determined not
22 based on the class EA planning process, but based on
23 the problem that MNR is required to address.

24 What MNR will have to do in the event of
25 a bump-up request and an individual EA is decide what

1 is the purpose of this individual EA.

2 It is very unlikely that the purpose will
3 be to provide a wood supply to a whole management unit.
4 The more likely scenario is that a bump-up request
5 would be granted in respect of, say, a particular
6 geographical location within a management unit and then
7 MNR would have to go back and make a determination.

8 Now, they may rely on matters that you
9 reached in your decision in terms of how they formulate
10 their purpose under or their definition of the
11 undertaking or they may not. They will have to as
12 Proponent decide what will be appropriate for an
13 individual EA.

14 To put it simply. You cannot in your
15 decision now set out the factors that MNR should or
16 should not consider when they may prepare individual
17 environmental assessments in the future. That's not
18 something that you can practically do because we don't
19 know what the problems are. It may be that the bump-up
20 will be granted in respect of preventing environmental
21 effects or mitigation that weren't even considered by
22 you during this hearing because of science.

23 MR. MARTEL: Okay, but stop there. Even
24 at that point there are guidelines which would or
25 should assist MNR in determining -- you see, to me the

1 factors might change a little bit, but the way you
2 resolve it is there has got to be some process which
3 leads to a conclusion.

4 So I don't look at individual -- whether
5 it is access is immaterial to me at this stage of the
6 game. It is that some day there is going to something
7 that we haven't considered or nobody has considered and
8 you are going to have to start to review everything to
9 decide how you are going to resolve that particular
10 issue.

11 It seems to me that's what some of the
12 parties have been trying to say to us, that, look, you
13 better start right from the beginning so we can
14 consider everything upfront, and that's the dilemma for
15 me.

16 I am very deliberately staying away from
17 null or need or any of those things at this time, or
18 access, but it seems to me that that is in fact what we
19 are saying. We might be running around the mulberry
20 bush to do it, but in fact we are still going to have
21 to have a process to handle all of those items that
22 might come that have yet to be identified that might
23 arise.

24 MS. SEABORN: Mr. Martel, those
25 unidentified future items may or may not result in a

1 successful bump-up request. You don't know that, we
2 don't know that.

3 I would submit that you cannot in your
4 decision somehow formulate for MNR how it should
5 prepare individual environmental assessments in the
6 future.

7 You have to remember, Mr. Martel, that
8 bump-up is a last remedy. Quite frankly, over the
9 years, you have heard the evidence, the minister has
10 not granted a particularly large number of bump-up
11 requests.

12 Now, what MOE has been striving to do
13 throughout the hearing is to try to ensure that the
14 approvals in place will minimize the number of bump-up
15 requests because the planning process and the Class EA
16 should be able to deal with people's concerns.

17 I think that is the matter that causes
18 you concern in terms of 5(3) and about going back to
19 square one on the management unit level, I will get to
20 that shortly.

21 Again, what I am trying to sort of break
22 away from that proposition is the future and, it is our
23 submission, that you cannot and should not in your
24 decision try and take responsibility for how MNR should
25 or should not prepare individual environmental

1 assessments.

2 I guess the final point I want to make on
3 this matter is that our position in respect of how a
4 future individual environmental assessment arising out
5 of a bump-up request would be structured has not been
6 formulated in any event as a result of the Board's
7 decision here on the definition of the undertaking.

8 Suppose we had never had the motion and
9 this argument on the definition of the undertaking, we
10 would still be making the same argument to you today
11 that you cannot in your decision try and delineate for
12 the Proponent how they should prepare future individual
13 environmental assessments.

14 So although Mr. Freidin's submissions on
15 this flow from your decision on the definition of the
16 undertaking, it isn't that decision in any event that
17 determines what the Proponent is going to have to do in
18 the future. It would be the requirements of Section
19 5(3) that will determine what the Proponent has to do.

20 The third submission I made at the outset
21 of this topic was that the decision that you make in
22 respect of this application will not be binding on
23 future proponents or future Environmental Assessment
24 Board hearing panels, but it will be persuasive.

25 I am talking about, Madam Chair and Mr.

1 Martel, the decision that you will come to write
2 shortly and how that will be used in the future.

3 In a legal sense it is the same thing as
4 your rulings. Your decision will be persuasive for
5 other proponents preparing Class EAs in the future, it
6 won't be binding on them. Future proponents may or may
7 not structure their environmental assessment based on
8 the reasoning that you give in your decision or they
9 could choose to follow it. It depends on the facts.
10 They don't have to follow what is in your decision.
11 They make that choice.

12 If your colleagues are conducting a class
13 environmental assessment hearing in respect of a
14 different undertaking than timber management, again,
15 when they come to write their decision your decision on
16 this class EA will be persuasive. They can look to
17 that decision, it may be of assistance to them or they
18 can say that the timber management hearing panel had
19 these facts in front of them, we have these facts, we
20 are going to go a different way in terms of how to
21 structure the approval.

22 MADAM CHAIR: Ms. Seaborn, this issue
23 interests us very much with respect to the null
24 alternative, and so we want to return to this when we
25 get into that discussion.

1 MS. SEABORN: We are all ready for that
2 one, Madam Chair.

3 If you have a real concern in your own
4 minds about how your decision may impact on future
5 proponents or how it may impact on your colleagues who
6 consider Class EAs you can in your decisions link your
7 reasoning specifically to the evidence in this case,
8 and if you choose to do so you can avoid making
9 statements in terms of interpretations of the
10 legislation, for example, that could be interpreted as
11 being general in nature.

12 You can be, quite frankly, as specific as
13 you want to be. You can be as general as you want to
14 be. That is your discretion.

15 Again, it is MOE's submission that you
16 should not worry too much about that matter because, as
17 I have indicated, your decision is going to be used by
18 lawyers in the future, it is going to be used to their
19 advantage if appropriate, it is going to be
20 distinguished based on the facts that were before you
21 where appropriate. It is going to be used both ways
22 and there is nothing that you can do about that.

23 It is our recommendation to you that you
24 link your reasoning to the evidence in this case with
25 some precision, but you are not bound to do that.

1 Madam Chair and Mr. Martel, I would now
2 like to turn to topic five which is the requirements of
3 Section 5(3) of the Environmental Assessment Act and
4 the null alternative. I am going to give you four
5 submissions in respect of this topic and then return to
6 each submission and try and provide you with some
7 detailed reasoning as to how MOE formulated its
8 position.

9 As I said, I propose to make four
10 submissions on this topic and I will come back to each
11 one. So I will go just through the four items that I
12 am going to address and then I will come back to them
13 individually.

14 Before you can give approval to proceed
15 with the undertaking you must be satisfied, first, that
16 the Class EA together with any terms and conditions
17 sufficiently fulfill the purpose of the Environmental
18 Assessment Act and, second, that the approval meets the
19 requirements of Section 5(3).

20 The second point is that the elements of
21 Section 5(3) can only be addressed in a generic,
22 non-site specific manner in the Class EA, leaving the
23 more detailed planning to be undertaken at the project
24 or management unit level.

25 My third submission is that when we speak

1 of a more detailed examination of Section 5(3) at the
2 project level, that does not mean, to put it simply,
3 more paper. What it means is that you can tailor your
4 planning effort and evaluate alternatives,
5 environmental effects and mitigation measures as
6 required by Section 5(3) in respect of the four
7 activities based on the circumstances particular to
8 that management unit.

9 My last general submission is that
10 alternatives to the undertaking need not be evaluated
11 at the project or management unit level. Accordingly,
12 the do-nothing alternative need not be re-evaluated for
13 each timber management plan on every forest management
14 unit.

15 However, when the planning team, the
16 local citizens committee or the public evaluates
17 alternatives in respect of the four activities, the
18 alternative of doing nothing is implicitly considered.
19 The null alternative is also used as a benchmark
20 against which to evaluate other alternatives.

21 Now, as I said, Madam Chair and Mr.
22 Martel, I know you are particularly interested in this
23 matter of the null alternative and I will come back
24 specifically to this fourth submission.

25 Now, I began this section by saying that

1 you must be satisfied that the approval will
2 sufficiently fulfill the purpose of the Environmental
3 Assessment Act and that it meets the requirements of
4 Section 5(3).

5 The rationale for that submission is
6 relatively straightforward. If you approve this
7 undertaking, and assuming you do so with conditions of
8 approval, you are saying to MNR that it may conduct
9 timber management on Crown land in Ontario and carry
10 out the four activities in accordance with a particular
11 planning process without any further approval under the
12 Environmental Assessment Act. That, in our submission,
13 is what you will be saying to MNR they can do.

14 MNR does not have to come back to the
15 minister or to the Board for an approval of individual
16 environmental assessments of timber management plans.
17 That is why we are here for a Class EA approval, so
18 that MNR does not have to prepare and present to the
19 minister for government review a series of individual
20 environmental assessments every five years on a hundred
21 management units in respect of timber management plans.

22 If that were the case, there would be
23 individual environmental assessments arriving into Ms.
24 Dahl's office almost every other day asking MOE to
25 prepare a review and asking the minister to decide

1 whether or not it should be as accepted as approved or
2 whether or not there should be a hearing.

3 If you determine it appropriate to grant
4 MNR's approval, MNR will go ahead and they will prepare
5 approved plans in accordance with one approval and that
6 is the approval that they will have received from you.
7 They will prepare timber management plans every five
8 years on all management units in accordance with that
9 approval.

10 Now, it is MOE's position that what you
11 must do is structure your approval in such a way that
12 when the four activities are planned environmental
13 effects, alternatives and mitigation measures which are
14 the essential elements of Section 5(3) are considered.

15 It is also our submission that you need
16 to ensure that the approval is structured such that it
17 requires an evaluation of alternatives in respect of
18 the four activities. That is the minimum requirement
19 that MOE is requesting you structure the approval to
20 address, alternatives in respect of the activities.

21 The reason why we say that alternatives
22 need to be considered for the activities is because it
23 is the carrying out of the activities that will result
24 in potential or actual environmental effects.

25 Now, I would like to try and give an

1 example of what would happen if your approval did not
2 require MNR to plan for and conduct the activities in
3 accordance with Section 5(3).

4 Let's assume that, Mr. Martel, you
5 approved the activity of access, you decide in your
6 decision that you have heard an incredible amount of
7 evidence about access, you have heard a lot about
8 roads, you have heard a lot of evidence about
9 alternative methods of access, you have heard a lot of
10 evidence about environmental effects, potential and
11 actual, across the area of the undertaking in respect
12 of access and you have heard some evidence about
13 mitigation measures, you have heard about a manual in
14 respect of access roads and suppose you are satisfied
15 that MNR has appropriately turned its mind to the
16 activity of access consistent with the requirements of
17 Section 5(3), but then let's assume you have all this
18 discussion about access in your approval, you approve
19 it as one of the four activities, you say: Great, MNR,
20 we are convinced you can do this in an environmentally
21 acceptable manner, you can do access to timber
22 management in an environmentally sensitive manner.

23 Suppose, however, that in your conditions
24 you don't require MNR when they are planning for access
25 to generate or evaluate any alternatives, you just

1 comment on access at large and and you decide that we
2 don't need any conditions about the evaluation of
3 alternatives in respect of access at all.

4 Now, in our submission that result would
5 generate an approval that would not be consistent with
6 Section 5(3) of the act. You would have failed to
7 require the Proponent to consider Section 5(3) of the
8 act as it relates to one of the four activities because
9 you would have said nothing and under that scenario you
10 would have said nothing in your approval about
11 requiring them to look at alternatives..

12 If MNR followed your approval and decided
13 not to impose the additional requirements at its own
14 because they think it is a good idea, forget about what
15 the Board's decision is, we are going to do it anyway
16 in terms of alternatives, they could do that, but
17 assuming they didn't and they said: This is great, the
18 Board said we could do access across the area of the
19 undertaking and they are not requiring us at the
20 management unit level to look at any alternatives at
21 all, they are so happy with access that we can just go
22 ahead and do it, the public wouldn't have any input on
23 site-specific considerations.

24 They wouldn't have an opportunity to
25 evaluate alternatives or to make proposals in respect

1 of alternatives. There would be nothing for the public
2 to view at the opening houses other than a proposal
3 from MNR that said this is where we are going to put
4 the roads, all roads.

5 So that is an example of what we mean
6 when we say that your approval must meet the
7 requirements of Section 5(3).

8 MADAM CHAIR: Before we leave that
9 example, Ms. Seaborn, we want your views on -- where is
10 your term and condition with respect to alternatives
11 for road planning? Is that Appendix 4?

12 MS. SEABORN: What we have said in
13 respect of road planning is that MNR is proposing in
14 its terms and conditions to look at alternatives.

15 We had one planning matter that is
16 addressed at page 5 of the conditions in respect of use
17 management strategies that may require the restriction
18 of public access, and Ms. Gillespie will be addressing
19 the rationale for that condition tomorrow.

20 Otherwise, Madam Chair, there is comment
21 on the evaluation of alternatives for roads in Appendix
22 4.

23 MADAM CHAIR: Ms. Seaborn, just to
24 clarify, you are telling us that MNR's terms and
25 conditions with respect to the evaluation of

1 alternatives they have suggested for primary and
2 secondary road corridors and through AOCs satisfies the
3 Ministry of the Environment?

4 You think it will fulfill the
5 requirements of 5(3) with the addition of your term and
6 condition 40(b)?

7 MS. SEABORN: Yes, in respect of
8 planning. We have another condition to do with
9 abandonment which is more the environmental effects
10 aspect of it, but you are quite correct.

11 MR. MARTEL: I just heard what you told
12 my colleague, but I also think I know what you said to
13 us. I look at Section 5(3) and then I ask myself:
14 What was the purpose of MNR going this route then if
15 they have to go back each time?

16 I guess I am having difficulty
17 understanding MNR's reasoning for going through this
18 process if they have to, each and every time they want
19 a road, consider all of these matters.

20 ---Discussion off the record

21 MR. MARTEL: Well, again, are we looking
22 at the null alternative in Section 5(3)? Are you
23 satisfied that MNR's proposals meet what you are
24 requiring each time?

25 MS. SEABORN: In respect of the

1 activities of access, renewal and maintenance, yes. In
2 respect of the activity of harvest, no, and we will
3 come to that.

4 I think, Mr. Martel, if I could continue
5 I will try and deal with the matter and get to the null
6 alternative and that hopefully will answer some of your
7 questions.

8 MADAM CHAIR: Don't rush too fast, Ms.
9 Seaborn, because Mr. Martel and I still want to hear
10 more from you about term and condition No. 40(b).

11 We want you to spent some time explaining
12 to us yet again, and you have explained many times, how
13 you find an additional alternative corridor that will
14 not restrict public access.

15 MS. SEABORN: Ms. Gillespie is looking
16 forward to addressing you on that very matter.

17 Now, Mr. Martel, in the list of four
18 submissions I gave you at the beginning of this section
19 I said that my second submission was that Section 5(3)
20 requirements can only be addressed in a generic manner
21 in a Class EA, leaving the more detailed planning in
22 respect of the activities to be undertaken at the
23 management unit level.

24 Now, I understand from looking at the
25 transcript that Mr. O'Leary put that proposition or a

1 similar proposition to you last week and I am going to
2 try and give you a specific example of what this means,
3 when we talk about generic at the Class EA or at the
4 parent level versus being specific at the management
5 unit level. I hope that this will be helpful.

6 Now, Subsection 5(3)(c)(i) of the act
7 requires the proponent to provide a description of the
8 environment that would be affected or that might
9 reasonably be expected to be affected directly or
10 indirectly by the undertaking, the alternative methods
11 of carrying out the undertaking and the alternatives to
12 the undertaking.

13 Now, in the Class EA document, Exhibit 4,
14 and in Panel 6 evidence MNR provided evidence in
15 respect of the environment affected at the provincial
16 level. You will recall that there was a lot of
17 evidence provided to you in terms of what the
18 environment across the province looked like.

19 In MOE's view, this evidence taken with
20 what was said in the Class EA satisfies the
21 requirements of Section 5(3) in a generic way. So MNR
22 satisfied a section of the act in a generic way by
23 providing you with a generic description of the
24 environment affected.

25 You had all this information, Mr. Martel,

1 of the environment affected across the area of the
2 undertaking. You didn't look at anything that was site
3 specific.

4 Now, in Panel 7 MNR addressed the
5 environment affected at the management unit level and
6 in that witness statement they said to you that in
7 order to make decisions which are to apply to a
8 specific geographic location it is necessary to collect
9 information to describe the environment that would be
10 affected or might reasonably be affected at that
11 location.

12 MADAM CHAIR: Do you have a transcript
13 reference for that?

14 MS. SEABORN: Yes. That statement is
15 taken, Madam Chair, from Exhibit 266A, MNR Panel 7,
16 paragraph 1 of the executive summary. We have
17 reproduced the specific quote at page 53 of our written
18 argument.

19 Now, MOE guidelines that Ms. Dahl
20 included in the source book of MOE's evidence indicate
21 that proponents should identify methods of data
22 collection and data sources, as well as any identified
23 data gaps and their significance and look at actions
24 taken to address data gaps as part of the description
25 of the environment affected.

1 So what MNR has done and what we have
2 called the generic or the parent level in this Class EA
3 is that they have looked at 5(3) and said we were
4 required to look at the environment affected, we have
5 gone and done that across the whole area of the
6 undertaking.

7 We haven't looked at it yet, though,
8 specifically. We haven't looked at the environment
9 that is affected that is required by 5(3) at the
10 project level.

11 However, in MNR's terms and conditions
12 they have a proposal to address that. They don't call
13 it, because I don't want to misstate Mr. Freidin's
14 position, they don't call this something that they are
15 doing to meet the requirements of 5(3). We say that by
16 including this provision in their terms and conditions
17 they are, in fact, meeting the requirements of of 5(3)
18 and I will go to the provision.

19 If you go to page 55 of our written
20 argument, you will see we reproduced MNR's term and
21 condition 1(c), Appendix 9 and Appendix 9 deals with
22 supplementary documentation for each plan, and in that
23 conditions MNR has said that it will ensure that each
24 plan contain a list of references to the sources of
25 information which is summarized on the values map or

1 maps or otherwise available in the database,
2 identification of the methodologies used for data
3 collection and identification of those subjects for
4 which data is recognized as being incomplete or
5 missing.

6 Now, Madam Chair and Mr. Martel, it is
7 exactly this kind of a term and condition that allows
8 you to - what has been referred to as - streamline the
9 EA process.

10 In respect of the environment affected at
11 the management unit level, MNR can address the
12 environment affected in the requirements of Section
13 5(3) by including in the supplementary documentation
14 this information relevant to that management unit only.

15 MNR doesn't have to go back in that
16 timber management plan, Mr. Martel, and reconsider all
17 of the evidence that it introduced to you in Panels 6
18 and 7. They are not dealing anymore with the
19 environment affected across the area of the
20 undertaking. They have to deal with it at the
21 management unit level.

22 They can look at the environment affected
23 based on the relevance of that environment to that
24 management unit. We have heard a lot of evidence, Mr.
25 Martel, about the differences between the management

1 units in the sense that we are dealing with a large
2 piece of geography and the environment affected or the
3 concerns with the government affected in the Great
4 Lakes/St. Lawrence area will be slightly different than
5 considerations in the boreal forest.

6 So in our submission you have in respect
7 of Section 5(3) for the environment affected, you have
8 a generic description in the Class EA and in the
9 evidence that applies across the area of the
10 undertaking and then you have this specific condition
11 which, if adopted by you, will require site-specific
12 consideration of the environment affected.

13 It is that combination that allows MOE to
14 say that MNR has met the minimum requirements of
15 Section 5(3) of the act. They have satisfied 5(3) at
16 both levels in terms of the environment affected.

17 I am going to try and come back and
18 explain to you where you -- I think this was another
19 concern you addressed, Mr. Martel, is where do you draw
20 the line in respect of 5(3) when we talk about this
21 streamlining and generic at one level in a management
22 unit and then the consideration at the management unit
23 level.

24 This might take a little time, Madam
25 Chair. We could either sit a long bit longer or we

1 could break now for lunch.

2 MADAM CHAIR: That's fine. We will break
3 for lunch now, Ms. Seaborn.

4 When we come back, and you decide when
5 you want to do this, we want you to revisit the access
6 issue again and we want you to show us where in MNR's
7 terms and conditions on access you feel they are
8 somehow employing implicitly or explicitly the null
9 alternative.

10 In other words, Mr. Martel and I do not
11 have it straight in our minds if we go to a public
12 meeting on a timber management plan where would we see
13 the words null alternative with respect to access
14 planning.

15 MS. SEABORN: We will try and answer
16 those questions. Thank you.

17 ---Luncheon recess at 1:55 a.m.

18 ---On resuming at 1:30 p.m.

19 MADAM CHAIR: Good afternoon, Ms.
20 Seaborn. We are ready to start when you are.

21 MS. SEABORN: Thank you, Madam Chair,
22 Mr. Martel.

23 Madam Chair, when we left off at lunch I
24 was still dealing with topic 5, the requirements of
25 Section 5(3) and the null alternative. You'll recall

1 when I gave you my introductory submissions my third
2 submission was that when we speak of a more detailed
3 examination of Section 5(3) at the project level that
4 does not mean, to put it simply, more paper.

5 I want to try to answer a question of
6 yours, Mr. Martel, that was posed to Mr. Freidin during
7 his argument, and your question was:

8 "What is the value of a Class EA if
9 you go back to square one each time?"

10 And while you asked your question to Mr.
11 Freidin in the context of the null alternative, which
12 I'm going to come to shortly, I think it is also a
13 relevant question in the context of Section 5(3)
14 requirements.

15 As I indicated previously it's our
16 submission that the effect of a Proponent submitting a
17 Class EA is that once approval for the undertaking is
18 given each project within the Class can proceed without
19 any further approval under the Act.

20 As we discussed, in the Class EA there is
21 a general discussion of the elements of Section 5(3),
22 alternatives are considered, environmental effects are
23 addressed, and mitigation measures are proposed. And
24 based on that evidence MOE has concluded throughout
25 Part 1 of its written argument that the Class EA meets

1 the requirements of Section 5(3).

2 Now, what you will be doing in your
3 approval is streamlining the application of Section
4 5(3) at the local level. If you go back to the example
5 I gave you this morning in respect of the environment
6 affected, it will still be considered at the local
7 level but on a narrower basis than it was at the Class
8 EA level.

9 Now, when the planning team starts to
10 prepare a plan subsequent to this approval they will
11 start with a number of givens or parameters within
12 which to plan.

13 For example, the purpose of the
14 undertaking has been considered in the Class EA and at
15 the Class EA level and, therefore, that purpose will
16 remain the same at the timber management planning
17 level.

18 The four activities and the alternate
19 methods of carrying out those activities will have been
20 approved, assuming you accept MNR's proposals. What
21 will be addressed at the management unit level is the
22 choice among those various alternatives.

23 As a result of the Class EA approval the
24 planning teams will have direction from you, from the
25 way your approval is structured, as to the planning

1 process that they are to follow. The planning team is
2 not going to go into a room, Mr. Martel, and say: Now,
3 we have to plan for timber management, how should we do
4 it? They're going to have a number of these matters
5 decided as a result of the Class EA approval, assuming
6 you structure your approval in such a way as requiring
7 MNR to look at the sorts of items that they've
8 delineated in their terms and conditions.

9 There's going to be a number of givens.

10 For example, if you agree that timber management
11 planning can be conducted with the use of guidelines,
12 there will be a range of guidelines and guides that
13 will be available to the planning team when they start
14 their planning and the planning team can rely on those
15 guidelines so long as you, in your approval, take the
16 position that timber management planning with the use
17 of guidelines is an appropriate way to proceed.

18 What occurs then at the management unit
19 level is greater detail in respect of narrower issues.
20 All the matters investigated by you during the hearing
21 will not have to be reinvestigated again by the
22 planning team; in fact, at the local level you don't
23 redo anything, what you do at the local level or at the
24 timber management planning level is you apply the
25 approved process and that approved process has flowed

1 from the work that has been done at the Class EA level.
2 And the planning team will be taking that process and
3 using the information that they have that is specific
4 to the management unit level when they apply that
5 process.

6 In fact, rather than going back to square
7 one, one of the main advantages to the Proponent of it
8 receiving a Class EA approval is that the approval can
9 structure the planning process for them to follow at
10 the forest management unit level.

11 As I indicated earlier, the timber
12 management planning team does not have to decide for
13 all 100 management units every five years when they
14 prepare plans, what is the purpose of this timber
15 management plan; they don't have to decide, what is the
16 planning process that we're going follow; what are
17 going to be our requirements for public consultation.
18 All of these things, to the extent that you address
19 them in the approval, will be taken as givens by the
20 planning team.

21 MR. MARTEL: All right, let me ask it
22 then. The purpose of this undertaking is to provide
23 fiber, in the final analysis, and in providing that
24 fiber I've heard people in the last two weeks say to us
25 you have to consider looking at, some people have

1 described it as -- MNR at least, we can't decide, for
2 example, roadless area. I just give you an example,
3 roadless area. Other people say: Yes, you have to
4 look at this and you can say that there's roadless
5 areas.

6 But as part of a planning process you
7 have to look at the amount of fiber that's going to be
8 taken from there and you have to consider that fiber.
9 If you consider that fiber, then you're considering the
10 whole purpose because the purpose of the undertaking is
11 to provide fiber. That, in fact, you're going back to
12 square one every time, no matter how you cut it.

13 If you start to say: Well, no, wait a
14 minute, we have to look at this and decide whether that
15 area is for fiber or that area is for wilderness area,
16 you are starting from square one.

17 Because it's a decision whether you will
18 not harvest there or whether you will harvest there,
19 and each time you do that you're starting from -
20 outside of getting the letters and detailing what you
21 want to do - you're starting right back to: Do we need
22 fiber?

23 I thought this purpose of this
24 undertaking was to satisfy that question, and once
25 you've made that decision where can you go and is part

1 of that a land use plan or is it part of providing
2 fiber?

3 I mean, it seems to me we're just going
4 around in circles. I'm not sure if it's dog chasing
5 the tail or the tail chasing the dog, but it seems to
6 me we keep coming around to the same position without a
7 definitive answer or position by somebody as to whether
8 we have to consider that fiber need each and every
9 time.

10 And you're saying to me: Yes, at the
11 local level you have to consider the need for fiber
12 every time.

13 MS. SEABORN: I think, Mr. Martel, there
14 are a number of questions there. I think to be clear
15 what we have said is: No, The proponent need not
16 reconsider the purpose of the undertaking at the
17 management unit level, they don't need to do that.

18 MR. MARTEL: Right.

19 MS. SEABORN: And I'm going to come to
20 that later on as to why we believe they don't need to
21 do it, because I understand the submissions from OFAH
22 were that based on an interpretation of the Act they
23 have to do it.

24 The second proposition we have put to you
25 is that what needs to be considered at the local level

1 in respect of alternatives are alternatives in respect
2 of the activities because the undertaking is defined to
3 include the four activities and the planning process
4 based on your decision.

5 Now, in terms of a roadless area, we took
6 the position in our answer to the Board's question
7 that: No, you do not at the outset of timber
8 management planning, at the management unit level,
9 delineate a geographic area of the undertaking as a
10 roadless area.

11 But we went on to say that it may be that
12 when you evaluate your alternatives in respect of
13 access the result will be that for a particular
14 five-year term of a plan you will not cut in an area
15 because you had considered your environmental impact
16 and the decision may be that the environmental
17 implications are such that there are not going to be
18 any roads in that area for this five-year term; it may
19 be because of cost or it may be because of the number
20 of areas of concern in a particular area, there may be
21 a variety of reasons. So, in that sense, the result at
22 the end of the process could be a roadless area.

23 And I think if you can look at it from
24 the point of view that what you're examining at the
25 local level are your impacts, then that may make it

1 more clear.

2 Let's use the example that you put to me
3 about fiber. If you accept the proposition that the
4 Proponent doesn't reconsider the purpose at the
5 management unit level, then you don't reconsider
6 whether or not fiber should be produced at all at the
7 management unit level, you don't say: Let's consider
8 not taking any wood off of this unit.

9 But what you do consider, after you set
10 your timber objective for that unit, is: What are the
11 impacts on the environment, viewing the environment
12 broadly, of taking that wood off of that unit during
13 this five-year plan?

14 So you consider fiber in a sense of the
15 impacts, and you would consider the impacts for the
16 Industry of not cutting the wood, you consider the
17 impacts to a tourist operator of cutting all around his
18 tourist camp and right up to his remote access lake.
19 Those are the sorts of considerations that come into
20 play when you look at access alternatives.

21 Now, I'll just go through and talk a
22 little bit, especially in light of the submissions that
23 you received last week from OFAH, about the rigor with
24 which you should be applying Section 5(3) at the
25 management unit level.

1 It's our submission that the Board
2 through its approval has the discretion to determine
3 the rigor with which you're going to require the
4 Proponent to apply Section 5(3) at the management unit
5 level. That is ultimately your decision, and how that
6 will be reflected in your decision will be through the
7 terms and conditions that you attach to the approval.

8 As I said, it's our position that as a
9 minimum you have to require an evaluation of
10 alternatives in respect of the four activities and that
11 is because it's the implementation of those activities
12 that may result in environmental impacts.

13 Now, what MNR does now and what they're
14 proposing, if you adopt their conditions, are to look
15 at alternatives for roads, and they're also saying that
16 they'll look at alternatives for areas of concern, and
17 they're saying they'll look at alternative
18 silvicultural treatments in the groundrules.

19 MNR does not provide for public comment
20 the alternative areas for harvest at the five-year
21 planning stage, and that is a separate topic that we
22 propose to address in argument tomorrow.

23 Now, if the Board accepts MNR's
24 conditions as augmented by MOE's proposals, the Class
25 EA and the conditions will serve to sufficiently

1 fulfill the purpose of the Environmental Assessment
2 Act. You'll recall that my earlier submission was
3 looking at other Class EAs, I pointed in particular to
4 the Roads Class EA, that is the test that you should be
5 applying.

6 Now, why isn't MOE asking you to require
7 more of the Proponent. It is our submission that in
8 law you could take Section 5(3) to its extreme in your
9 approval. We're not asking you to do that. First of
10 all, we're practical and in some peoples' opinion
11 simple minded on these matters and cognizant of the
12 concerns raised by Industry and the public that the
13 timber management planning process be manageable.

14 While you could conceivably require that
15 alternatives be considered in respect of almost all
16 decisions, it just isn't feasible. That would amount
17 to, Mr. Martel, in our submission, a result that would
18 require the Proponent to go back to square one at the
19 timber management planning level.

20 If you require them in your decision to
21 look at alternatives in respect of wood supply, for
22 example, that would be a requirement that would be
23 saying to MNR: You do have to go back to square one
24 every time. We have not proposed the type of in-depth
25 presentation of alternatives that the OFAH/NOTOA

1 Coalition urges upon you.

2 It is MOE's position that Section 5(3)
3 has been addressed by MNR at the Class EA level. It is
4 also our position that the framework is there in MNR's
5 current conditions for you to be satisfied that Section
6 5(3) will be met at the local level in respect of the
7 activities.

8 When applied, the planning process that's
9 being proposed by MNR will address the basic elements
10 of 5(3) so long as you require MNR to make available
11 for public review the decisions they make in respect of
12 alternate harvest areas.

13 And as I said, Madam Chair, I want to
14 reiterate, this is MOE's position that these are the
15 minimum requirements that the Board should be imposing
16 on MNR to ensure that the conditions of the Act are
17 met.

18 You have the jurisdiction and the
19 discretion to go further, and parties have asked you to
20 go further than what MOE proposes. And, in our
21 submission, there's no basis in law for us to say to
22 you that MOE has given you the parameters within which
23 you can operate and you can't go beyond those
24 parameters. You can in law require the Proponent in
25 your approval to do more to meet the requirements of

1 Section 5(3) than we propose.

2 In the context of alternatives, as I said
3 earlier, we're only asking for the alternatives for the
4 four activities that define the undertaking. That is
5 where we differ from the propositions put forward to
6 you by OFAH, for example, when they talked about asking
7 the Proponent to look at alternatives in respect of
8 wood supply. And, again, the reason why we believe
9 it's important in respect of the four activities is
10 because of the impacts on the environment.

11 My last general submission to you is item
12 4 under this topic and that was MOE's rationale for the
13 position that alternatives to the undertaking, which is
14 an element of Section 5(3), need not be addressed at
15 the management unit level. As I understand the
16 OFAH/NOTOA Coalition in their submissions they said
17 that you did have to consider alternatives to the
18 undertaking again at the management unit level.

19 Now, Section 5(3)(a) of the Environmental
20 Assessment Act requires the Proponent to provide a
21 description of the purpose of the undertaking. In the
22 Class EA MNR provided a single purpose in respect of
23 the undertaking and the purpose was reconsidered, as I
24 mentioned, by the Board in its procedural ruling back
25 in February of 1990. The purpose has been throughout

1 the hearing and in the Class EA the same thing.

2 Now, what has typically occurred in other
3 Class EAs, if you have a look at them, is that the
4 description of the purpose of the undertaking has been
5 delegated to the project level. What that means is
6 that rather than saying in the Class EA or in the
7 parent document, this is the purpose of the
8 undertaking. It gives that responsibility to whomever
9 is going to prepare the project within that Class. And
10 I think if I take you to the Roads Class EA this may
11 become a little clearer, which is Exhibit 886.

12 Now, if you turn to page 3 you'll see
13 under project proposal, item 2 -- I'm sorry, this is
14 the section after the conditions are listed which are
15 the first few pages in the body of the document. You
16 see in the third line down it says:

17 "The Proponent, usually a supervisor
18 in an MNR district office, will evaluate
19 and document the potential project in
20 terms of need for access, purpose of the
21 project, objectives to be achieved,
22 alternatives including the null
23 alternative, and general environmental
24 concerns."

25 The Roads Class EA was, therefore,

1 structured in such a way that the purpose of each
2 project within the class is not stipulated in the
3 parent document. There is no one purpose of the Roads
4 Class EA.

5 In the Timber Management Class EA there
6 is one purpose, and this is an important distinction
7 because this is what makes the Timber Management Class
8 EA different from all other Class EAs. This
9 undertaking is not different so much because it has
10 gone to a hearing and there's been all sorts of
11 evidence adduced, it is different because the
12 delineation of the purpose of the undertaking has not
13 been delegated to individual forest management units.

14 What this means, in a practical sense in
15 the context of timber management planning, is that when
16 the planning team sits down to write a plan, unlike the
17 situation where under the Roads Class EA a group of MNR
18 were getting together to put together a project under
19 that Class EA, they don't have to decide what is the
20 purpose of the project - in other Class EAs they do
21 have to decide what the purpose is of the project -
22 they can take that purpose as a given.

23 Now, how does this relate to our
24 submission in respect of alternatives to the
25 undertaking. It has always been MOE's position and the

1 submission we made in our written argument that it's
2 the purpose of the undertaking that defines your range
3 of suitable alternatives to the undertaking.

4 In this Class EA the alternatives to the
5 undertaking were evaluated in the parent document,
6 there was evidence adduced before you with respect to
7 the alternatives to during Panel 17 and through the
8 analysis in the Class EA MNR came to the conclusion to
9 select timber management as the preferred undertaking
10 to put forward for approval.

11 In this Class EA it would be of no
12 utility, therefore, to consider alternatives to at the
13 project level. Quite simply put, if your purpose
14 hasn't changed at the project level from what it was in
15 the parent document, then why reconsider your
16 alternatives to, it's unnecessary.

17 Now, if you go to the Roads Class EA
18 again, page 4 under 2.2 alternatives, you'll see that
19 at the first paragraph under alternatives it says:

20 "Alternatives to roads can
21 successfully fulfill some access needs
22 and purposes: railways, waterways, air
23 transport and trails are possible
24 alternatives, but the feasibility of
25 using them depends upon the purpose for

1 providing access."

2 Now, it makes sense in a Class EA such as
3 the Roads Class EA, given that the purpose of project
4 may differ for that project to reconsider alternatives
5 to at that level. It's our submission that in the
6 Timber Class EA this doesn't have to happen and that's
7 what distinguishes this Class EA from the Class EAs
8 that have been approved previously.

9 Now, if you accept based on that
10 reasoning that alternatives to the undertaking don't
11 need to be considered at the forest management unit
12 level, then it flows from that that the null
13 alternative need not be reconsidered at the management
14 unit level as an alternative to the undertaking.

15 MOE has never suggested to the Board that
16 the null alternative be considered as an alternative to
17 the undertaking at the management unit level.

18 Now, having said that, that doesn't
19 mean - precisely, Mr. Martel, you know what I'm going
20 to say now - that doesn't mean that it is the end of
21 the matter in respect of the null alternative. All
22 we're saying is that when the planning team sits down
23 to get the purpose of the undertaking they start
24 looking at their objectives, they don't need to, on an
25 FMU basis, say: Well, maybe we should just think about

1 recycling for this management unit and we will consider
2 that. We're saying that's not the kind of thing that
3 the planning team has to do at the management unit
4 level, that would be a reconsideration of alternatives
5 to at the project level, which is not necessary.

6 This is, in our submission, entirely
7 distinct from the proposition that once the approval is
8 in place a planner never considers the null or do
9 nothing option again, and it was precisely in this
10 context that Ms. Dahl addressed the null alternative in
11 her testimony. And I'd like to try and give you some
12 examples.

13 Now, in its written argument MNR conceded
14 that the specific conditions encountered at the
15 management unit level may dictate that certain timber
16 management activities should not take place at specific
17 times or locations for sound environmental reasons, and
18 that is found at page 83 of their argument.

19 If during the planning --

20 MADAM CHAIR: Would you repeat that
21 please, Ms. Seaborn.

22 MS. SEABORN: Yes. MNR indicated that
23 the specific conditions encountered at the management
24 unit level may dictate that certain timber management
25 activities should not take place at specific times or

1 locations for sound environmental reasons.

2 For example, if during the planning of
3 the activities it is determined that a harvest activity
4 should not take place during the five-year term of a
5 particular plan on a particular piece of geography,
6 that is in effect what MOE calls the local application
7 of the null alternative; you've considered your options
8 in respect of harvest and for whatever reason, cost,
9 environmental, socio-economic you've decided to do
10 nothing on that piece of geography.

11 This is not a reconsideration of a land
12 use decision, it's merely good environmental planning
13 and something that MNR does quite regularly when it
14 prepares timber management plans in the sense that they
15 do make decisions not to harvest in certain areas or
16 not to build a road in a certain area.

17 Mr. Campbell in his cross-examination of
18 Mr. Clark back in MNR's Panel 7 evidence was
19 questioning Mr. Clark on a number of items, and flowing
20 from the questions the former Chair asked Mr. Clark:

21 "THE CHAIRMAN: Well, what about no
22 road at all?"

23 And Mr. Clark responded:

24 "That would be considered as an
25 alternative."

1 That, in our submission, is an example of
2 a local application of the null alternative, deciding
3 based on environmental impacts that you're not going to
4 build a road there at all, that you're not going to
5 operate there at all, that you're not going to spray
6 herbicides there at all. It's not an application of
7 the area of concern process, it's an application, in
8 our view, of choosing the do nothing alternative.

9 Now suppose for example the planners
10 deciding how close to cut to a waterbody, the
11 alternatives may be to leave a 120-metre buffer and cut
12 everything else up to the 120-metre buffer; an
13 alternative may be to cut up to the 120-metre buffer
14 and then modify your operations, do a selection cut
15 within the reserve; or you may decide not to operate in
16 that area at all. That again, in MOE's view, is the
17 local application of the null alternative.

18 What is important is that when you're
19 looking at those range of options each option will have
20 a different environmental impact associated with it,
21 there will be different environmental impacts of not
22 operating in that area as opposed to modifying your
23 operations in that area as opposed to leaving a larger
24 reserve. The result in terms of the impact on the
25 environment of each of those choices will be very

1 different.

2 Now, the consideration, in our view, of
3 the null alternative at the local level is not a
4 reconsideration of the land use decision; in fact, in
5 our view, it's entirely consistent with the MNR's
6 rationale for why timber management plans have been
7 made the subject of this environmental assessment in
8 the first place.

9 And I'd like you to go to page 77, if you
10 would, of our argument. In the section of the Class EA
11 which discusses the role of government policy in
12 formulating timber management plans, the Class EA
13 indicated:

14 "While the objectives and policies
15 arrived at through higher levels of
16 planning in MNR provide general direction
17 to timber management the key decisions
18 of if, where, when, and how timber
19 management will take place are made in
20 individual timber management plans.

21 "Since these decisions are made at the
22 management planning level, the
23 preparation of those timber management
24 plans has been made the subject of this
25 environmental assessment."

1 Now, it's MOE's submission that it's
2 precisely these decisions of if, when, where, and how
3 timber management will take place that must be
4 addressed in the planning process and, in our
5 submission, it's precisely these decisions of if, when,
6 where and how timber management will take place that
7 must be addressed through your terms and conditions of
8 approval in order to ensure that the approval is
9 structured in such a way that the requirements of
10 Section 5(3) are met.

11 Now, we have not required a term and
12 condition which explicitly refers to the null
13 alternative in respect of access or any of the other
14 activities. Some parties have said that it be
15 explicit. As we indicated, we believe that it is
16 considered in any event, and the brief example I gave
17 was from the testimony of Cam Clark where he said that
18 alternative would be considered.

19 When one talks about the evaluation of
20 alternatives in respect of access, in our view,
21 implicit in that evaluation is a consideration of doing
22 nothing. So while MNR's terms and conditions don't say
23 in them that when we consider or when we evaluate
24 alternatives in respect of roads we will consider the
25 null alternative, it has been our view since the outset

1 of the hearing that to do a proper evaluation that
2 necessarily requires you to look at the null
3 alternative.

4 MR. MARTEL: See that last line is a
5 problem I think, because once you've decided that
6 you're going to take fiber - let's use fiber as an
7 example - the consideration of a road, you can't do
8 fiber without a road, if I understand the process,
9 unless we're going to start flying it out, which I
10 don't think anyone is going to do.

11 So if you make the determination that
12 you're going to harvest, it assumes that you're going
13 to have access to that supply of wood, otherwise you
14 can't get it out.

15 So that doesn't seem to quite -- although
16 what you're telling me doesn't seem to fit with what
17 the process is that occurs once you've decided you're
18 going to have fiber. You're not going to decide
19 whether I should have a road or not because that
20 decision was made when you decided that you were going
21 to get fiber, there's no other way of getting it out
22 unless you're going to build a canal or you've got a
23 waterbody there or a rail line happens to be running
24 by, which in northern Ontario there's only two of them.

25 It seems to me that somehow that's just

1 removed, otherwise you're left with, you can't get the
2 fiber. If you start to say: Well, do I need a road in
3 there or not? I mean, that seems to be removed. I
4 can't see how you can get away from that.

5 MS. SEABORN: Just because you have
6 approval across the whole area of the undertaking to
7 conduct timber management doesn't, in MOE's view,
8 permit you to operate wherever you want regardless of
9 environmental impacts.

10 MR. MARTEL: I'm not saying that, Ms.
11 Seaborn. What I'm saying is, let us say on a
12 particular unit you decide there's going to be
13 harvesting, the whole proposition then becomes one of:
14 Are you going to build a road?

15 And I'm saying: Well, no, that doesn't
16 follow automatically. Once you've decided that you're
17 going to harvest an area you're going to need a road,
18 and the null alternative, how can that be considered?
19 I mean, you decide you're harvesting; you've got to
20 have access or you don't harvest.

21 MS. SEABORN: When you evaluate your
22 alternatives in respect of how to get that fiber,
23 presuming you've made the decision with respect to
24 harvest, you have to look at the impacts associated
25 with that activity based on where you want to put those

1 roads.

2 Now, when you're doing that analysis you
3 should consider no road at all because it allows you
4 then to compare the environmental impacts and the
5 costs. And it may be that based on your evaluation of
6 the impacts of putting in a road, that while the cost
7 to Industry of not getting that wood out may be high,
8 the cost to the tourist operator who's also entitled to
9 operate in that management unit may be higher in those
10 instances, so you may end up on that management unit
11 saying we cannot put a road in there.

12 We understand that we have to meet a
13 timber objective for this forest management unit, but
14 in this case we've looked at our alternatives,
15 including not putting in a road, and we just can't meet
16 that timber objective in this area. That would
17 require, in our view -- a number of things could
18 happen.

19 MNR could look at a contingency area,
20 they could look at getting allocations from other
21 management units - you've heard evidence on that -
22 there are a number of ways that matter could be
23 addressed so that you still meet your fiber objective.

24 And what we're saying, Mr. Martel, is
25 that you cannot throw out a consideration of not

1 operating there in the first place; you cannot assume
2 with this approval that MNR can put in roads and
3 operate wherever it wants regardless of environmental
4 impacts. So I understand your point about the road.

5 The other thing is in terms of the road
6 location you may be able to, by having examined the
7 alternative of not putting a road there, it may lead
8 you to another side of the management unit for that
9 five-year term of the plan that you hadn't considered
10 before.

11 You may say that the impacts on the
12 tourist industry of putting a road through there are so
13 great that we would rather pay more money and build
14 more roads and go further afield within that management
15 unit in order to satisfy the timber objective. There
16 are a number of different things the planning team
17 could do.

18 MADAM CHAIR: Excuse me, Ms. Seaborn. I
19 think our concern about this issue has to do with
20 exactly that and, that is, that a hundred separate
21 decisions feeding into one purpose which is to supply
22 timber, if each of those 100 decisions is made that:
23 No, we won't do timber management planning here because
24 the costs are too high and the environmental impacts
25 are too high, we're having trouble reconciling that

1 with how the proponent's purpose of the undertaking is
2 to be carried out.

3 We don't have any trouble in
4 understanding how it might fulfill the requirements of
5 the Environmental Assessment Act but, practically
6 speaking, practically speaking what does that lead to,
7 what does that kind of decision made in each case lead
8 to at the end of five years over 100 forest management
9 units?

10 MS. SEABORN: I think the example I gave
11 was that what you would do in the case of a road, if
12 you decided based on your analysis of doing nothing,
13 you would consider your other options in terms of going
14 somewhere else.

15 It is unlikely -- I mean, I can't
16 conceive of a situation where we would have on a
17 hundred management units at the same time planning
18 teams coming up with the decisions that say that we
19 can't operate anywhere, we can't put roads in anywhere
20 and we can't harvest anywhere because of the
21 environmental impacts.

22 And I take it that is your concern, if
23 that happened you would then not be able to meet the
24 purpose of the undertaking as a whole?

25 MADAM CHAIR: Well, the proponent is the

1 one that has to worry about meeting the purpose of the
2 undertaking.

3 But, practically speaking, I think Mr.
4 Martel and I question that idea of substituting in any
5 facile way timber that you would give up in any one
6 location.

7 The situation of the future is the forest
8 is getting smaller and the competing interests are
9 getting larger and obviously it's not going to be a
10 situation where substituting sources of timber is
11 something that's going to be done readily, it's going
12 to become a more difficult problem.

13 And if you set up a planning system that
14 requires you to put into place demands on, or I suppose
15 the proponent would call it, constraints on their
16 ability to fulfill their purpose how do you, how does
17 the Ministry of the Environment balance that sort of a
18 situation?

19 MS. SEABORN: I guess we would say, Madam
20 Chair, leaving aside a discussion of the null
21 alternative, that there are some constraints on the
22 Ministry in any event.

23 Put aside the question of the null
24 alternative, the District Land Use Guidelines that
25 you've heard so much discussion about give a series of

1 permitted uses, it tells the people of Ontario that
2 within specific geographic areas a number of activities
3 are going to go on concurrently.

4 The timber management plans are being
5 prepared in the same geographical area as wildlife
6 management plans are being prepared. There's lots
7 of -- MOE wouldn't call it integrated planning, but
8 what there is are planning for a number of competing
9 uses across the area of the undertaking at the same
10 time, and the Board has heard lots of evidence about
11 that back in MNR's Panel 1.

12 So regardless of the issue of the null
13 alternative, I think that competing uses is a practical
14 reality, is a practical problem and it's a reality
15 that, sure, we all have to face.

16 But I don't see how you can address that
17 particular issue in terms of competing uses for the
18 forest resource any wider than in the context of
19 impacts based on the manipulation of the forest cover
20 through timber management.

21 That's where we've drawn the line between
22 land use planning and timber management planning
23 decisions.

24 In terms of, Madam Chair, our terms and
25 conditions we have not, as I indicated, required MNR to

1 refer to the null alternative in any of our conditions
2 explicitly.

3 MADAM CHAIR: So, Ms. Seaborn, what
4 happens when the null is never mentioned in any timber
5 management plan from here on in?

6 MS. SEABORN: If you have a concern about
7 that, it's our submission that you have the
8 jurisdiction to explicitly require MNR to consider the
9 null alternative. This is one matter that was
10 addressed by FFT. You have that jurisdiction.

11 As I said, the EA Branch has always
12 considered that when you use terminology such as
13 evaluation of alternatives the way MNR has for
14 consideration of options that you would consider the
15 null alternative.

16 There isn't a requirement in the
17 legislation that says you must consider the null
18 alternative, there isn't a statutory, a legislative
19 base for it; what there is are numerous references to
20 it in other Class EAs that have been approved.

21 In all other Class EAs there are
22 considerations, as I explained, of alternatives to
23 which we're not requiring and there are also references
24 to considerations of the null alternative beyond the
25 consideration of alternatives to.

1 MADAM CHAIR: So what are you asking us
2 to say about the null in our decision, Ms. Seaborn?

3 MS. SEABORN: Probably as little as
4 possible I guess, Madam Chair.

5 MR. MARTEL: Well, if I could add then,
6 how much detail do you want on this little as possible?
7 Because, you see, that's the other area of concern.

8 Automatically when I think of this I
9 think, you know, surely - and I've said it repeatedly
10 at this hearing - none of this can be done with the
11 Ministry of Natural Resources just running around and
12 operating like a drunken sailor, they really must
13 protect the environment.

14 So when someone says: Well, you've got
15 to have the null alternative, then we start to hear
16 different positions of how much documentation, how many
17 alternatives, and it seems to me when anyone makes a
18 decision that considers the environment, considers
19 dollars and cents, you look at a whole range of things
20 to try -- without even thinking in terms of about:
21 Well, am I even going to consider a road?

22 I guess that's what I'm having difficulty
23 getting my head around, because when you're going to
24 plan surely the purpose is to get the best plan to
25 accommodate as many people as is humanly possible

1 because of the great variety of demands on the forest.

2 And you've seen some of the Ts&Cs and
3 some of the demands. I mean, you could document, based
4 on some demands, enough to write a tome, quite frankly,
5 and I'm just not sure if you would ever do any timber
6 management planning. On the other hand, that's not to
7 say that MNR can go do its thing whatever the way it
8 wants.

9 And that seems to be the two positions.
10 I guess maybe Thomas was right, you never find a
11 meeting of the minds in these sort of situations. Dr.
12 Thomas I think said that, you never find a meeting of
13 the minds. But it's not an either/or proposition.

14 MS. SEABORN: In terms of your question,
15 Madam Chair, about what we would like you to say in
16 your decision about the null alternative, I think the
17 first thing we would draw your attention to is again
18 the statement at page 77 from the Class EA.

19 We want the approval to recognize that
20 it's the decisions of if, where, when, and how timber
21 management will take place that must be addressed in
22 the planning process to ensure the requirements of
23 Section 5(3) are met.

24 Now, MNR has said in the Class EA it's
25 these decisions of if, where, when and how, if timber

1 management should take place on a particular piece of
2 geography during that five-year plan. We want the
3 approval to require MNR to justify that decision.

4 What the null alternative will do is it's
5 the mechanism for considering the environment and it's
6 the mechanism for comparing the effects of doing
7 nothing to doing something. And what we want the
8 planners to be aware of and to justify in their
9 decisions is how is it better to proceed with a
10 particular activity that they're planning; is it really
11 better?

12 Because there are always going to be,
13 given the broad definition of environment,
14 environmental impacts associated with doing nothing,
15 there are going to be socio-economic impacts on the
16 Industry of doing nothing. So you can't look at it
17 from the point of view that the null alternative is
18 always going to drive you to the conclusion that always
19 doing nothing is always going to be the better
20 alternative. In lots of cases it's not going to be the
21 better alternative because of factors such as
22 socio-economic effects, because of factors as the
23 Industry has given you evidence on. It goes both ways.

24 So I think in terms of your question
25 about arriving at a conclusion of no options across a

1 hundred management units, if you document the null
2 alternative properly that shouldn't be the result, and
3 if the Board is concerned that that could be the result
4 of their approval, then I think that -- I have
5 difficulty, I guess, with that concept.

6 MADAM CHAIR: Ms. Seaborn, could you to
7 tell us again why you're not going to ask that this be
8 a formal term and condition of the Board's approval?

9 MS. SEABORN: The EA Branch in its
10 various guidelines and documents that it's produced has
11 always considered words such as evaluation of
12 alternatives, consideration of alternatives to mean a
13 consideration of the null, to mean an evaluation and
14 consideration of alternatives, including the null
15 alternative. That's the first point.

16 The second point is that if you look at
17 other Class EAs that are in effect at the moment
18 there's a discussion in all of them about doing
19 nothing, using the null alternative. You have the
20 jurisdiction to put in the words null alternative if
21 you think it would be helpful, and if you have a real
22 concern about whether or not it will be documented.

23 MADAM CHAIR: Why isn't your client
24 asking us to do that?

25 MS. SEABORN: We considered it. I think,

1 as I said, we felt in using words such as evaluation,
2 consideration it would go hand-in-hand. We've seen
3 examples in plans where, in our view, they do apply the
4 null alternative, they don't characterize it that way
5 but they make a decision not to harvest close to a
6 particular waterbody, that's really a local application
7 of the null alternative. They're doing nothing, there
8 are no operations in that reserve. So, in our view,
9 they do it in any event.

10 The second reason I suppose why we're not
11 requiring it in the term and condition is that legally
12 there is no, at this present time, a legislative basis
13 requiring the null alternative. You cannot in the
14 Environmental Assessment Act find a reference to the
15 null alternative per se.

16 MADAM CHAIR: But if the Ministry of the
17 Environment feels strongly that this would be a
18 beneficial aspect of the timber management planning
19 process, then why do you care if there's no legislative
20 basis for it just as there wouldn't for any other term
21 and condition the Board would order.

22 MS. SEABORN: I think the difference is
23 that the other conditions we're asking for can be tied
24 back to the requirements of Section 5(3) of the Act in
25 terms of alternatives and the evaluation of the

1 alternatives, there's a legislative base for that. All
2 I'm saying is there is not a reference in the Act to
3 the null alternative.

4 MADAM CHAIR: If the Board doesn't do
5 something about the null alternative in any decision we
6 make, then presumably the Environmental Assessment
7 Branch will continue to do its job and will be working
8 with this proponent and others with respect to how they
9 see all their guidelines and so forth being carried out
10 in the planning process and the Minister of the
11 Environment would have some -- you know, at the end of
12 an approval period, if we approve this undertaking, the
13 Minister of the Environment would have again some
14 ability to do whatever he or she wanted to do with
15 respect to the null alternative.

16 So I guess the Board is saying, convince
17 us we have to do something about it.

18 MS. SEABORN: What we have said, Madam
19 Chair, in the context of alternative methods and the
20 null alternative is that we believe it's being done.
21 So when you say, when the Board says do we need to make
22 sure that something is done about it. If you have a
23 concern and if you don't accept my submission that when
24 MNR makes a decision about not operating in a reserve -
25 sorry, let me step back.

1 Not operating in a reserve, for example,
2 is what we would call the null alternative. For some
3 reason, as I say, I don't know why, MNR throughout has
4 refused to acknowledge that as being the null
5 alternative. I expect it's because of this distinction
6 between alternatives to and alternative methods which
7 is why they don't call it that.

8 We're not hung up enough on the words to
9 require them to call it the null alternative in the
10 terms and conditions, but the EA Branch would expect
11 that and the Minister would expect, if there was a
12 bump-up request, that the full range of alternatives be
13 examined.

14 And I can assure you that based on the
15 guidelines that the Minister has in place for
16 evaluating bump-up requests at the moment, one of the
17 things that would be considered was how wide and how
18 good was the proponent's consideration of alternatives.
19 We think that MNR ignores an evaluation of the null
20 alternative in that regard at their peril.

21 MR. MARTEL: Is it the way the
22 terminology is being applied. Let me give you back the
23 example you gave to us. You said, let us say there's a
24 decision made with respect to not harvest near a
25 waterbody due to the impacts, and you said this is the

1 null alternative. It didn't start out as the null.

2 When somebody says to me you've got to
3 consider the null alternative, it means you start off
4 by saying: Well, we might not do anything. See, it
5 seems to me we're coming at it backwards. You're
6 saying: Well, they make a decision not to harvest near
7 the water because of the impacts, this is null.

8 But I don't think MNR started out - maybe
9 I'm wrong - but it seems to me that that's a result
10 of -- it's as a result of the thinking that goes on
11 that you dismiss null but that you don't start from
12 null.

13 Now, is that -- and you've used three or
14 four examples and you've used them I think each time in
15 the same way; you arrive at null but you don't start at
16 null and say: Well, we dismissed it because it doesn't
17 work or it's not viable. And I'm not sure you haven't
18 got the horse before the cart.

19 MS. SEABORN: You could, Mr. Martel,
20 start with the null, there's no question, you could
21 line up your three alternatives and say: I'm going to
22 do nothing, I'm going to modify operations, I'm going
23 to cut right to the shoreline and you could evaluate
24 the environmental impacts of each of those alternatives
25 and make your decision about which was the best way to

1 proceed based on your advantages and disadvantages with
2 respect to the three alternatives. You could do that.

3 You could arrive at the null alternative
4 through the application of a guideline by prescribing a
5 reserve in an area, not operating and you are doing
6 nothing. Granted that is a different way of looking at
7 the null alternative, I agree, and I don't refute the
8 distinction that you have made. You end up in the same
9 place though at the end.

10 And what we're not prescribing in the
11 terms and conditions in detail is how MNR will come to
12 that final conclusion. We think that they should use
13 good environmental planning principles in order to make
14 their decisions and we're prepared to give them some
15 discretion to do that.

16 Other parties to the hearing are not
17 prepared to give them that discretion, which is why
18 they are proposing, I presume, an explicit condition
19 with respect to the null alternative. I think that's
20 the difference in their positions.

21 MADAM CHAIR: Ms. Seaborn, before we take
22 the afternoon break, a moment ago you said something to
23 the effect that in the future if the Ministry of
24 Natural Resources is required to undertake an
25 individual EA because of the granting of a bump-up

1 request by the Minister of the Environment, that the EA
2 Branch and the Minister of the Environment would be
3 unlikely to accept that EA or approve it unless the
4 null were one of the alternative methods that were
5 evaluated.

6 MS. SEABORN: No, I think I was unclear
7 on that, Madam Chair. What I said was that if an
8 activity is planned for and a member of the public
9 comes along and says: I don't like that activity, I
10 don't like that area that you're going to go harvest
11 in, I want you to consider these other alternatives, I
12 want you to do a number of things. They go through the
13 planning process, the person makes a bump-up request.

14 If when reviewing the documentation
15 relevant to that issue the Branch sees that the
16 Proponent in evaluating its alternatives didn't look at
17 a wide range of alternatives, they didn't look at the
18 impacts on the environment of doing nothing so that
19 they could do this benchmark comparison, then the
20 result of that could very likely be that the bump-up
21 request would be granted because the evaluation of
22 alternatives would not have been wide enough. It's in
23 that sense in terms of the Minister making a decision
24 on a bump-up request.

25 The other thing the Minister might do, as

1 Ms. Dahl explained in her evidence, is say to MNR - and
2 this has happened with respect to -- Ms. Dahl explained
3 in her evidence that there have been bump-up requests
4 that were settled. What happened was the request, as
5 Ms. Dahl explained, went to the Branch and what the
6 Minister determined was that the party and MNR should
7 go back and look at a wider range of alternatives in
8 order to see if they could work out a concern and, in
9 some cases, the bump-up request ended up being
10 withdrawn on that basis:

11 And, Madam Chair, just to follow on that,
12 Ms. Dahl gave evidence that I believe in at least one
13 case the result was that the new alternative, that the
14 planning team or whomever it was at MNR, I can't
15 remember the exact wording of the evidence, and the
16 person who made the bump-up request, they were able to
17 agree on a different alternative that wasn't presented
18 originally in the range of alternatives. They looked
19 wider and they found something else to solve the
20 problem, so on that basis the request was withdrawn.

21 MADAM CHAIR: We'll take our afternoon
22 break.

23 MS. SEABORN: Thank you.

24 ---On recessing at 2:40 p.m.

25 ---On resuming at 3:05 p.m.

1 MADAM CHAIR: Please be seated. Please
2 continue, Ms. Seaborn.

3 MS. SEABORN: Thank you, Madam Chair.
4 I'd like to move now to topic No. 6 on our outline.

5 There are four main areas that I want to
6 address this afternoon under this topic and I'll just
7 read to you those areas and then come back to each one.

8 The first area, Madam Chair, is MOE's
9 position that the use of guidelines with monitoring is
10 an appropriate mechanism to ensure environmental
11 protection is achieved in both normal operating areas
12 and areas of concern. So the guideline approach is the
13 first topic I want to address.

14 The second topic I want to address is
15 MOE's condition 21(c) which is designed to address
16 concerns associated with nutrient depletion.

17 The third area I want to address in the
18 context of environmental effects is MOE's proposal that
19 you adopt as a condition of the approval special
20 planning in respect of sensitive sites until the
21 silvicultural guides are amended to include the general
22 standard site type initiative.

23 And the last area that I'll address under
24 this topic is MOE's condition 43(e) that recommends the
25 removal of water crossings on abandoned roads.

1 With respect to the guideline approach,
2 we deal with this matter in our written argument in two
3 places and I'll just give you the page numbers for
4 future reference - you don't need to turn to it. We
5 deal with it at pages 57 to 58 of our argument, and
6 again at pages 133 to 137 of our argument.

7 Now, the first submission that I'd like
8 to make to you in respect of the guidelines is that
9 it's MOE's submission that the use of implementation
10 manuals is an appropriate mechanism to achieve
11 environmental protection in normal operating areas and
12 areas of concern.

13 It is also MOE's position that the
14 prescriptions actually applied must, however, be
15 monitored to ensure that both timber and non-timber
16 values are in fact protected by that prescription.

17 The Board will recall that in Appendix 7
18 of MNR's terms and conditions MNR lists a series of
19 implementation manuals that are in use in respect of
20 timber management. The manuals, the Board will recall,
21 fall into three categories, and you heard extensive
22 evidence about these various manuals. There's the
23 provincial guides, there's the category called the
24 operational construction manuals, and the third
25 category are the resource environmental manuals.

1 A considerable amount of time was spent
2 during the hearing in respect of the development, use
3 and rationale behind various manuals.

4 Now, MOE supports their application in
5 timber management planning because they provide
6 direction to the planner in respect of appropriate
7 practices while, at the same time, they provide
8 flexibility. This is a sensible way to proceed,
9 especially in a Class EA approval, where the Board
10 could not begin in its approval to list appropriate
11 prescriptions in respect of timber and non-timber
12 values.

13 By including conditions that require the
14 use of manuals you are, as I said previously,
15 streamlining the environmental assessment process. For
16 example, the fish habitat guidelines were designed to
17 protect both fish habitat and water quality. MOE
18 technical staff had input into those guidelines and MOE
19 relies on their application to protect water quality.

20 MOE also wants to know over the course of
21 the approval whether in fact the guidelines are
22 achieving their intended objectives and in fact
23 protecting water quality.

24 It is for precisely that reason that we
25 rely so heavily on monitoring provisions that will

1 gather information through the area inspection program
2 that will assist in identifying effects and determining
3 effectiveness.

4 It's our submission that if the guideline
5 approach was not adopted the Board's approval would
6 have to be very specific in respect of prescribing the
7 actions necessary to prevent, change, mitigate or
8 remedy the effects upon the environment of the
9 undertaking.

10 Similarly, if your approval did not
11 embrace the guideline approach but instead delegated to
12 the planning team the discretion to, for example,
13 protect fish habitat and water quality on the basis of
14 the best available science, it's our submission that
15 the planning team would have to go through an exercise
16 on every management unit almost akin to the exercise
17 that produced the fish habitat guidelines. The
18 planning team would have to review scientific
19 literature, evaluate a full range of alternatives and
20 predict their impacts. That would, in MOE's view,
21 defeat the purpose of a Class EA approach to timber
22 management planning.

23 I want to emphasize that if based on the
24 evidence the Board is of the view that a particular
25 guideline or manual is inadequate for its intended

1 purpose, you do have the jurisdiction to impose a
2 condition requiring the document be amended in a
3 particular way.

4 You may decide to include only some of
5 the implementation manuals as part of your approval in
6 respect of specific values. You may decide to require
7 something different to protect a particular value. You
8 may decide that in order to satisfy yourself that an
9 actual and potential effect is properly addressed that
10 you want to give detailed direction in your decision as
11 to how that effect would be most appropriately
12 mitigated. In our submission, you have a wide
13 jurisdiction in this regard.

14 As I indicated at the outset, it's MOE's
15 view that the manual approach is appropriate in the
16 context of a Class EA and the guideline approach,
17 coupled with monitoring, is a practical way to proceed
18 given the size of the undertaking and the variety of
19 effects that may arise as a result of the
20 implementation of the activities.

21 Now, in MOE's view there are two
22 significant environmental effects of timber management
23 that would not, in our submission, be adequately
24 prevented, mitigated or remedied through the
25 application of existing implementation manuals, and

1 these are nutrient depletion and acidification effects
2 associated with intensive harvesting practices; and,
3 second, is sediment deposition as a result of road
4 abandonment.

5 We don't see those two matters as being
6 appropriately covered off in the list of implementation
7 manuals that are found in Appendix 7.

8 Now, with that background I want to move
9 specifically to MOE's condition 21(c) which is designed
10 to address the environmental effects or potential
11 environmental effects associated with nutrient
12 depletion.

13 And just to remind you of that condition,
14 perhaps if you could turn to the terms and conditions I
15 handed out this morning, to page 3. And you'll see
16 that this is a highlighted condition. We have reworded
17 the wording of this condition substantially and I'll
18 come to the reasons for that.

19 Now, MOE's position in respect of
20 nutrient depletion can be summarized really in four
21 points and I want to give you a list of those points
22 and then I'll deal with each one of them.

23 Our first submission is that intensive
24 logging methods ought to be restricted in the area of
25 the undertaking on certain sites.

1 My second submission is that operational
2 restrictions in respect of intensive logging methods
3 can be implemented in the field.

4 And my third submission is that the Board
5 cannot rely on MNR's proposed environmental guidelines
6 to address the concern expressed in respect of the
7 long-term productivity of nutrient forest sites.

8 And the fourth point I'd like to make in
9 this area is that while MOE supports MNR's initiative
10 to conduct a long-term study pertaining to the effects
11 of full-tree harvest and full-tree chipping on
12 long-term forest productivity, the results of that
13 study will not be available during the term of this
14 approval even if the Board decides the approval should
15 be in effect for nine years.

16 It's MOE's evaluation of the evidence
17 before you that you can conclude that intensive logging
18 methods ought to be restricted on certain sites. Mr.
19 Neary testifying on behalf of MOE was very careful to
20 present you with the summary of all the testimony and
21 scientific papers you had been presented with in
22 respect of full-tree harvesting.

23 Mr. Neary testified that at the very
24 least there is a conflict in the scientific community
25 with respect to impacts of intensive logging and

1 concluded that we should be cautious.

2 In particular, Mr. Neary relied on a
3 technical report produced in January, 1992 by MNR which
4 concluded, and I quote:

5 "The final and most effective means of
6 reducing the impact of full-tree
7 harvesting on site fertility and
8 long-term productivity may be simply to
9 minimize the use of this harvesting
10 strategy on sites which may be
11 susceptible to nutrient depletion."

12 Mr. Neary adopted this position in his
13 testimony and we submit that the Board should as well.

14 It is our submission to you that Mr.
15 Neary addressed the matter of nutrient depletion in a
16 straightforward, unbiased manner. He summarized the
17 testimony you heard from others on the topic, including
18 Messrs. Armson, Greenwood, Methven and Hutchinson.

19 Mr. Neary's qualifications to provide you
20 with expert evidence in respect of nutrient depletion
21 were attacked by both the Industry and MNR. The basis
22 for the attack was that Mr. Neary was not a forester or
23 a soil scientist or a forest ecologist.

24 Mr. Neary was, in our submission, in a
25 better position to address issues in respect of

1 nutrient depletion because he is not a forester. Mr.
2 Neary is a chemist, he studies nutrient cycling. He
3 made the point to the Board that you need nutrients to
4 grow a tree and Mr. Neary, in our submission, made it
5 quite clear that he understand about nutrients.

6 There's no question in our submission
7 that intensive logging methods move nutrients around on
8 a site. It is our submission that you should not give
9 Mr. Neary's evidence less weight than Mr. Armson's or
10 Mr. Greenwood's or Dr. Methven's just because Mr. Neary
11 is not a forester.

12 Mr. Neary was very careful in his
13 evidence. He did not give you an opinion as to which
14 body of scientific thought was correct, he gave you an
15 opinion that the conflict is legitimate.

16 Now, our proposal to restrict intensive
17 logging methods has been attacked on the premise that
18 there is no conclusive scientific proof for the need
19 for our condition. Time doesn't permit me to review
20 with you again the various articles and studies that
21 you were presented with by the witnesses throughout the
22 hearing. This matter came up time and time again. Our
23 proposal has also been attacked as being impractical,
24 and that issue I do want to address.

25 As the Board is aware, at the five-year

1 planning level the report that provides the forester
2 with an understanding of the forest types on any single
3 management unit is the FRI. The FRI is not and was
4 never intended to be a stand-by-stand analysis, and
5 this is essentially the position that MNR took in its
6 argument and in its evidence before you.

7 MNR at its discretion may or may not
8 gather additional information in advance of carrying
9 out a harvest activity. What I mean by that is that
10 OPCs are not mandatory and site-specific information in
11 the form of pre-operation inspections are not required
12 for areas allocated during the five-year term of the
13 plan.

14 Now, MOE has considered its position in
15 respect of the gathering of mandatory information and
16 we've accepted in light of the arguments put forward by
17 MNR and the Industry, in respect of costs in
18 particular, that MNR not be required to gather
19 mandatory information at the five-year planning
20 horizon. In a perfect world and in a world where we
21 didn't have to worry about cost, it would obviously be
22 much better to go out and gather site-specific
23 information at the five-year planning level on the
24 areas that have been allocated for harvest, and know
25 everything you can know about those sites.

1 Having accepted that there is a cost
2 involved in gathering site-specific information in
3 advance of harvest, we are in a dilemma. We know that
4 there are sites out there that are susceptible to
5 nutrient depletion and our quandary on this issue has
6 been: How could these sites be best protected at the
7 least cost and effort?

8 Now, if you look at our condition 21(c)
9 you'll see that we have suggested that:

10 "Logging methods that remove, without
11 redistribution from a site, the majority
12 of the branches, stems, tops, needles and
13 leaves shall not be utilized on very
14 shallow and shallow sites or sites
15 otherwise susceptible to nutrient
16 depletion."

17 And I want to deal briefly with this
18 concept of shallow and shallow sites.

19 Now, MOE determined that soil depth was
20 one site descriptor that could be used in delineating
21 the sites that would be most likely to be impacted upon
22 as a result of full-tree harvest and full-tree chipping
23 operations.

24 MNR has concerns with the use of soil
25 depth as a site descriptor in respect of limiting

1 full-tree harvest or full-tree chipping. We know it's
2 not perfect, but we think it can be used to identify
3 these sites. And this is our reasoning: The
4 difficulty MOE has with MNR's reluctance to rely on
5 soil depth is that it is used throughout the
6 silvicultural guides as a parameter to provide
7 direction to the forester. It is our submission that
8 limiting operations based on soil depth is in fact
9 entirely consistent with what MNR is supposed to be
10 doing now.

11 For example, if you look at the spruce
12 guides - and I'll give you the reference, I don't think
13 you need to go to it - which is Exhibit 382 at page 96,
14 you'll see there's a decision model for black spruce on
15 shallow or very shallow soils over bedrock, there's
16 direction to the forester based on soil depth. And the
17 reason why I say there's a direction to the forester
18 based on soil depth is because shallow and very shallow
19 soils are defined in the guides. It is our submission
20 that the foresters do make decisions today based on the
21 soil depth.

22 At page 42 of the spruce guides --

23 MR. FREIDIN: Page...?

24 MS. SEABORN: 42 of the spruce guides,
25 full-tree harvest is limited on very shallow soils of

1 marginal fertility. That is a direction to the
2 forester.

3 The Board will recall in some of the
4 Table 4.11s that they looked at that soil depth was
5 used to prevent certain types of operations. Soil
6 depth was a parameter that was used at the beginning of
7 some of the Table 4.11s in terms of splitting out your
8 different site types in respect of, say, spruce.

9 Now, as I indicated earlier, MOE has
10 accepted MNR's proposition that they cannot collect all
11 the desired information in respect of the areas where
12 they're going to operate at the five-year planning
13 level, but based on the type of information they do
14 have at the five-year level they can limit operations
15 and prescribe ground rules based on soil depth.

16 So it is using the same mechanism MOE is
17 recommending that shallow and very shallow sites not be
18 cut using intensive logging methods because of the
19 their generally poor nutrient status. That is what
20 we're proposing in condition 21(c).

21 And, Madam Chair, Mr. Martel, you'll note
22 that we've taken out the reference to full-tree harvest
23 and full-tree chipping, we refer to logging methods,
24 and I'll come to the rationale for that in a moment.
25 So we have a general restriction in 21(c)(i) on the use

1 of logging methods on shallow and very shallow sites.

2 Now, in the event that a shallow site is
3 highly productive, which was one criticism of our
4 original proposal, we decided to build some flexibility
5 into our condition, so we formulated condition
6 21(c)(ii), and what this does is it gives the forester
7 an opportunity to harvest these shallow sites that may
8 be very productive so long as the nutrient status of
9 the site and the potential impacts on site productivity
10 are addressed.

11 In addition, the exception to
12 21(c)(ii) -- I'm sorry, the exception to 21(c)(i) would
13 be recorded and monitored. In our submission, this
14 approach provides a balance. Shallow and very shallow
15 sites will not be intensively logged unless the
16 forester can justify the operation.

17 The second submission --

18 MR. MARTEL: Can I ask a question?

19 MS. SEABORN: Yes.

20 MR. MARTEL: What do you say to MNR's
21 proposal or concern that you're trying to look merely
22 at one characteristic in isolation from the rest when
23 determining that? I mean, they made a great deal about
24 the fact that that's just one of the considerations
25 amongst many.

1 MS. SEABORN: Mr. Martel, as I indicated,
2 the only way -- if you accept that there is an
3 environmental effect associated with intensive logging,
4 with full-tree harvest and full-tree chipping, if you
5 accept that, then the next question is: What do you do
6 about it?

7 In our submission, you can deal with it
8 one of two ways. To address MNR's criticism of our
9 condition you would have to, in your conditions,
10 require MNR to go out and look at these sites at the
11 five-year planning level and collect all sorts of
12 information on them. So you don't just have the one
13 descriptor of soil depth. They would go out, they
14 would have a look at sites and do all sorts of things
15 they may want to do. They may do OPCs, they may do
16 pre-harvest surveys or a number of things they could
17 do.

18 At the same time that MNR criticizes our
19 proposal because we only use one site descriptor
20 they're also saying to the Board but you don't make us
21 go out and gather all this information on a
22 site-specific basis. And our point is that they can't
23 have it both ways.

24 So we had to choose something and we felt
25 that soil depth made sense, and that was the evidence

1 that was presented to you because it is something that
2 is already addressed in the existing silvicultural
3 guides and that's why I wanted to take you to those
4 guides to show you that there is direction to the
5 forester already based on one parameter, that is soil
6 depth.

7 So I think first of all, my first
8 submission is that I think MNR's criticism of us is
9 unfair in the sense that they rely on it in the
10 silvicultural guide. And the second submission is they
11 can't have it both ways.

12 If they don't want a restriction on these
13 harvesting practices, then the other way they can deal
14 with it is by going out and collecting all the
15 information necessary and building that into their
16 groundrules and addressing nutrient status on all sites
17 at the outset of the planning process. They can do it
18 that way if they wanted to. I expect that is not as
19 palatable a solution to the problem as our proposal is.

20 MADAM CHAIR: Ms. Seaborn, does your
21 proposed term and condition 21(c)(i) now anticipate
22 that full-tree logging and chipping can take place on a
23 site so long as the slash is left on the cut-over or
24 redistributed, realigned?

25 MS. SEABORN: Well, one of the

1 submissions I was urged to make to you in this regard,
2 Madam Chair, is that our term and condition 21(c) has
3 been roto-limbed. In fact it was going to be the next
4 area I was going to cover, was that we have changed the
5 wording of it to address specifically the concerns that
6 were raised by Mr. Roll in respect of full-tree
7 chipping operations in particular and I will come to
8 that matter.

9 Now, the Board will recall that following
10 our evidence the OFIA did introduce reply evidence in
11 respect of full-tree chipping. Full-tree chipping was
12 first described to the Board as an alternative logging
13 method by MOE.

14 Mr. Neary and Mr. Bax gave evidence to
15 you that there are different environmental effects
16 associated with full-tree chipping, and it's not
17 because full-tree chipping is a new operation, that is
18 MOE's concern, our concern is that that alternative
19 harvest method may have very different environmental
20 impacts than the other harvest methods that were
21 described to you.

22 Now, Mr. Roll explained to you that some
23 equipment, and the example he gave was the roto-limb,
24 was capable of leaving the slash on site and suggested
25 that our condition, as it was previously worded, would

1 prevent full-tree chipping operations on sites where
2 the slash would not be removed.

3 Now, Ms. Gillespie questioned Mr. Roll in
4 respect of Industry's concern with flexibility, and I
5 won't review that exchange now but it's found in Volume
6 385 of the transcript, pages 66413 to 66434.

7 Our evaluation of Mr. Rolls' testimony
8 was that some intensive logging methods are capable of
9 leaving slash on the site and for that reason he viewed
10 our original condition as being too rigid. He
11 indicated that he understood that the intent behind our
12 condition was to address nutrient concerns.

13 So what we have done, Madam Chair, Mr.
14 Martel, in our condition is we have referred to logging
15 methods that remove, without redistribution from a
16 site, the majority of the branches, stems, tops,
17 needles and leaves shall not be utilized on very
18 shallow and shallow sites or sites otherwise
19 susceptible to nutrient depletion.

20 What we're saying to Industry and MNR is
21 that if you can full-tree harvest or full-tree chip on
22 a site and use equipment that doesn't take the slash
23 off the site, doesn't remove the nutrients, then that's
24 fine, you can do that. The intention behind our
25 condition was never to place all sorts of unrealistic

1 restrictions on the Industry, it was to make sure that
2 these sites were somehow addressed based on what we
3 view as being a legitimate scientific concern in
4 respect of this issue.

5 So as I said, Madam Chair, the wording in
6 21(c) has been changed to address concerns raised by
7 Industry.

8 There was one other point though I wanted
9 to bring up that came out in final argument, is that in
10 terms of our condition allowing for exceptions in the
11 event that the forester thinks that they can address
12 the nutrient concerns on a site, what Mr. Freidin may
13 say about this and what has been said before is that:
14 Oh, MOE is only proposing another paper exercise.

15 We're not proposing a paper exercise,
16 we're prepared to leave the judgment on this issue to
17 the professional forester, but what we are requiring of
18 them is to turn their minds to the matter of the
19 nutrient status of the site. We feel we have gone very
20 far in terms of flexibility with respect to this
21 condition, and other parties have argued to you that
22 there should be just a ban, a complete ban on full-tree
23 harvesting on sensitive sites.

24 See, we're not suggesting a paper
25 exercise for the sake of doing paper, we expect that if

1 the forester can justify operating on these sites that
2 they justify it in a reasonable and comprehensive
3 manner.

4 And that is why we say at the bottom of
5 21(c)(ii) that the reasons for the exceptions must
6 specifically address the nutrient status of the site
7 and potential impacts on site productivity.

8 Now, the third point I made to you in
9 relation to why MOE believes adoption of condition
10 21(c) is essential is because, in our view, the Board
11 cannot rely upon MNR's proposed environmental
12 guidelines to address the concern.

13 It is our view that this is one matter
14 that should not be delegated to MNR. The Board should
15 delineate now restrictions on the use of these logging
16 techniques rather than leave that development to a
17 guideline to be formulated some time during the course
18 of the approval.

19 Our reasons for this position are as
20 follows: First, Mr. Kennedy testified that they would
21 develop the guidelines with a group of experts and it
22 would be premature to say that MNR had reached a final
23 decision as to the content and format of the
24 guidelines. We don't really know what they're going to
25 look like.

1 Second, Mr. Kennedy did testify that the
2 guidelines would deal with the issue of the removal of
3 nutrient bearing material on sensitive sites but could
4 not give any detail as to how the issue would be
5 addressed, perhaps as guidelines, perhaps just as good
6 practices. MOE doesn't know.

7 Now, at the same time MNR is talking
8 about developing some environmental guidelines to
9 address this matter, we have MNR arguing strenuously in
10 their written argument and in their oral argument
11 against the proposition that the use of intensive
12 logging methods is a problem in any event.

13 We have Mr. Armson who testified that
14 there was no direct or inferred evidence to conclude
15 that full-tree harvest causes nutrient depletion.

16 Frankly, we're very skeptical about these
17 guidelines. We don't have a problem with the guideline
18 approach to address this concern, but we don't think
19 the Board in its decision can delegate responsibility
20 for dealing with this issue to MNR in a set of yet
21 undefined guidelines.

22 What we propose is that the Board adopt
23 our condition, MNR can develop their environmental
24 guidelines, and they can address nutrient depletion if
25 they want to in those guidelines. The matter can be

1 revisited at the end of the approval which, if the
2 Board agrees with the submissions made by MNR, would be
3 nine years.

4 My final submission in respect of
5 nutrient depletion is that MOE supports the long-term
6 study in respect of full-tree harvest and full-tree
7 chipping. In our view, steps must be taken now,
8 however, to address the concern. If we do nothing and
9 wait for the study we will have no further information
10 on this matter nine years from now when the approval
11 comes up for renewal.

12 You heard evidence in reply that the
13 studies were going to go on for some 15 to 20 years at
14 great expense. We think the studies are important and
15 we applaud MNR for this initiative. But, in our
16 estimation, we believe the evidence is conclusive that
17 we cannot wait.

18 We think that MOE's condition is
19 necessary, especially in light of statements from MNR
20 witnesses such as what was provided to us in Panel 10.
21 I believe it was Mr. Greenwood who stated that:

22 "Since the potential for productivity
23 loss in Ontario is not considered
24 significant given current harvest
25 practices and rotation, measures to

1 prevent or minimize these potential
2 effects do not normally form a part of
3 operational decision-making at this
4 time."

5 What we're asking, Madam Chair and Mr.
6 Martel, through the adoption of MOE's condition is to
7 ensure that this matter does normally form a part of
8 operational decision-making.

9 MR. CASSIDY: Ms. Seaborn, I don't mean
10 to interrupt, but I wonder if I might just ask for some
11 clarification, and it may not be necessary to provide
12 it now but perhaps you could think about this.

13 With respect to the new wording of the
14 terms and conditions 21(c), the use of the word stems
15 is contained in there, and I only ask this question
16 because it's new since I had any opportunity to
17 cross-examine anyone on it.

18 But I'm wondering what the meaning of
19 stems is, if it means the actual tree that you're going
20 to remove for harvesting purposes, or whether that
21 means something other, because that in fact would be
22 the object of harvesting is to remove the stem. If I
23 can just get that clarification, I would appreciate it.

24 MS. SEABORN: I'm told that a stem is not
25 the same as a bole of a tree, if that answers your

1 question.

2 The third topic, Madam Chair, that I want
3 to address in respect of environmental effects is MOE's
4 proposal that you adopt as a condition of the approval
5 special planning in respect of sensitive sites until
6 the silvicultural guides are amended to include the
7 general standard site type initiative.

8 Now, this is MOE's condition 32(c), and
9 if you turn to page 5 of MOE's conditions you'll see
10 that the last sentence is highlighted.

11 There was evidence given to you that in
12 light of the general standard site type initiative that
13 it was possible to deal with sensitive sites when the
14 silvicultural guides were amended.

15 That was the evidence that was given
16 during MOE's case and we wanted to make it clear then
17 consistent with that evidence and the condition that
18 this requirement would be in the interim condition if
19 the Board chooses to adopt it. Something that MNR
20 would have to do until such time as the silvicultural
21 guides are amended.

22 And what we are asking you to do in
23 adopting this condition is to accept that for the
24 interim sensitive sites be evaluated using the AOC
25 process; we're asking you that in defining what a

1 sensitive site is that the Board adopt the site
2 descriptors proposed by MOE; and third, we're asking
3 that you stipulate in your decision that this condition
4 be interim until the silvicultural guides are revised
5 to include general standard site types.

6 Now, before I get into the specifics of
7 the condition, I just want to quickly go over the
8 reason for MOE's concern.

9 Now, our concern dates back to evidence
10 you heard during MNR's Panel 4 which was Exhibit 135,
11 and one of the reports that was in Panel 4 was the
12 Dixon report.

13 One of the conclusions in the Dixon
14 report was that 22 per cent of the total area cut was
15 classified as non-treatable, that's at page 71.
16 Non-treatable areas were defined as areas that
17 consisted of rocky, wet and shallow sites and partially
18 cut stands, all of which were deemed untreatable by the
19 regeneration techniques of the plan. Dixon was
20 concerned in his report that non-treatable areas may be
21 permanently lost to timber production.

22 You also received evidence from Mr.
23 Hynard in Panel 11 in respect of areas that were called
24 the cut-and-walk-away areas. You recall you received a
25 graph, Exhibit 534A. If you compare the numbers, the

1 untreatable areas in the Dixon report can be correlated
2 to the cut-and-walk-away area in Exhibit 534A.

3 This can be done because the last fiscal
4 year that Dixon looked at was 1980-81 and that is the
5 only year common with the years that were looked at in
6 Exhibit 534A which began in 1980-81.

7 The Board has received evidence that
8 areas that are difficult to treat are left to
9 regenerate naturally. Based on OFIA's Table 3, which
10 they reproduced at page 214 of their written argument,
11 the poor performance of natural regeneration as
12 compared to artificial regeneration can be partially
13 attributed to the inclusion of what Dixon calls
14 untreatable areas, what Hynard calls cut-and-walk-away,
15 and what MOE has called sensitive sites.

16 MOE is asking the Board to consider a
17 more in-depth planning process for sites which
18 presently do not appear to be regenerating
19 satisfactorily.

20 Now, the Board will recall Mr. Neary's
21 testimony that MNR was unwilling to define a sensitive
22 site. So Mr. Neary looked at MNR's own documents and
23 put together a list of descriptors, and these are the
24 descriptors that we use in this condition. That matter
25 is addressed in detail in MOE's witness statement which

1 is Exhibit 2200A, and I won't go through the rationale
2 for each site descriptor today.

3 Until these site types are delineated and
4 reported upon for each species it's our view that
5 special planning must occur. And how can they be
6 delineated? In our view, sensitive sites should be
7 dealt with through the silvicultural guides. The
8 silvicultural guides are the document that provides
9 direction to the forester for normal operating areas.
10 There's a separate guide for each species in the boreal
11 forest, the jack pine and the spruce guides will be the
12 most important.

13 In our view, it makes sense for sensitive
14 sites, including for sensitive sites based on the site
15 descriptors that we've set out, to be dealt with in the
16 silvicultural guides. But that isn't going to happen
17 for a little while. MNR says that they can revise the
18 silvicultural guides within three years of the
19 approval. It may take longer, we hope it won't. We
20 think that some special planning should occur in the
21 interim.

22 We are not putting a restriction on
23 Industry in terms of operating on these sites, what
24 we're asking them to do is to treat them specially, to
25 not roll them into normal operating areas under Table

1 4.11 until the general standard site type initiative
2 has been completed.

3 While we would agree with a proposition
4 made to you that the site descriptors are not perfect,
5 we think that they're the best available in the absence
6 of the Board requiring an OPC or a gathering of
7 pre-harvest information at the five-year planning
8 level.

9 Our submission in this regard is really
10 the same as the submission in respect of our condition
11 on intensive logging methods. Another way to deal with
12 the sensitive sites is to require MNR to go out and
13 gather all sorts of information at the five-year
14 planning level.

15 We have tried to propose something a
16 little different. One of the things that we also did
17 in 32(c) that was a change that isn't readily apparent
18 is that in terms of the list of descriptors we have
19 taken out a reference to shallow soils. We had shallow
20 soils in there, however, we recognize that there was an
21 overlap between our condition 21(c) and 32(c).

22 The adoption, in our submission, of MOE's
23 condition 21(c) will afford protection for shallow and
24 very shallow sites and so it is not included in those
25 site descriptors.

1 Madam Chair, there's one more topic that
2 I'd propose addressing under environmental effects. I
3 see it's four o'clock and we can start with that
4 tomorrow morning, if that's convenient for you.

5 MADAM CHAIR: Thank you very much, Ms.
6 Seaborn.

7 We'll adjourn now for the day and be back
8 at nine o'clock tomorrow morning.

9 Thank you.

10
11 ---Whereupon the hearing was adjourned at 4:00 p.m., to
12 be reconvened on Tuesday, November 10th, 1992,
13 commencing at 9:00 a.m.

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